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December 21, 2022

Chief Clerk Carl D. Cicchetti
Connecticut Supreme and Appellate Court
Supreme Court Building
231 Capitol Avenue
Hartford, CT 06106

Re: *Hartford Fire Insurance Company v. Moda LLC*, No. SC 20678

Dear Chief Clerk Cicchetti:

Finn Dixon and Herling LLP and Kasowitz Benson Torres LLP represent Defendants-Appellants ("Fisher")[1] in the above-captioned matter. We write pursuant to Practice Book Section 67-10 to respectfully bring the following recent authority to the Supreme Court's attention.

Notice of Supplemental Authority

1. *Ungarean v. CNA*, 2022 PA Super 204, 2022 WL 17334365 (Pa. Super. Ct. Nov. 30, 2022) (affirming *Ungarean, DMD v. CNA*, 2021 WL 1164836 (Pa. Ct. Com. Pl., March 25, 2021), attached hereto as Exhibit A. In *Ungarean*, the Pennsylvania Superior Court affirmed a grant of summary judgment for the policyholder. The decision provides further support for Fisher's arguments that: (i) there was physical loss of or damage to its property (Br. 20-22, 25-32; Reply 3-5, 8); (ii) the period of restoration language does not refute coverage (Reply 11-12); and (iii) the "loss of use or market", "delay" or "consequential loss" exclusions do not bar

[1] Defendants-Appellants are Moda LLC; Marc Fisher LLC; Fisher International LLC; MB Fisher LLC; Fisher Footwear LLC; MFKK, LLC; Unisa Fisher Wholesale LLC; Fisher Licensing LLC, Fisher Accessories LLC; Fisher Sigerson Morrison LLC; MBF Holdings LLC (DE); Marc Fisher Holdings LLC; Fisher Services LLC; MBF Air LLC; Unisa Fisher LLC; MBF Licensing LLC; MBF Invest LLC; MBF Holdings LLC (WY); Fisher Design LLC; Marc Fisher Jr Brand LLC; Marc Fisher International LLC; MF-TFC LLC; Easy Spirit LLC; MFF-NW LLC; and MFF NW Investment LLC.

coverage (Reply 6-7).[2] The appellate court specifically affirmed each of the three points for which Fisher cited the trial court's decision below. (Br. 29 n.29; Reply 7, 11 n.16.)

First, the court held that "it is, at a minimum, reasonable to find that [the insured's] loss of the use of his dental practice due to COVID-19 and the governmental orders equated to a direct physical loss of his property." *Id*. at *5. The court also noted that "another way insureds may demonstrate that they have satisfied the 'direct physical loss or damage' to covered property is by invoking the contamination theory so aptly explained by another well-reasoned trial court opinion [where] the court explained that if an insured alleges the actual presence of COVID-19 on its property caused the property to become uninhabitable or unusable, it has 'adequately alleged physical loss or damage to its property under the contamination theory . . .'" *Id*. at *5 n.3 (citing *SWB Yankees v. CNA Fin. Corp*., 2021 WL 3468995 (Pa. Ct. Com. Pl. August 4, 2021), which Fisher cited Br. 33).

Second, the appellate court found that "the 'period of restoration' provisions are most reasonably construed as time limits for coverage, and do not otherwise alter the definition of 'physical loss or damage.'" *Id*. at *5.

Third, the appellate court held that the policy's consequential loss exclusion, which was defined as delay, loss of use or loss of market, did not bar coverage. *Id*. at *7-8.

2. ***Shusha, Inc. v. Century-National Ins. Co*., 2022 WL 17663238 (Cal. Ct. App. Dec. 14, 2022)**, attached hereto as Exhibit B. *Shusha*, in which the California Court of Appeal reversed the trial court's grant of a demurrer, supports Fisher's argument that the contamination of its property with COVID-19 constitutes physical loss of or damage to property. (Br. 20-22, 31-32; Reply 4-5, 8-9.)

The court held that "[e]ven assuming that [the insured] was required to allege a distinct, demonstrable physical alteration of the property to show coverage under the policy," allegations that the virus "was certain to have been present" at the insured's restaurant "at various times" on its walls, floors, furniture, and other surfaces, thousands of people visited the restaurant, "beyond doubt" some were infected with COVID-19, and employees also tested positive for COVID-19, along

[2] Another Pennsylvania Superior Court case decided the same day, *MacMiles, LLC v. Erie Ins. Exch*., 2022 PA Super 203, 2022 WL 17332910 (Pa. Super. Ct. Nov. 30, 2022), attached hereto as Exhibit C, reached the opposite result with respect to whether loss of use constitutes physical loss or damage when the insured, unlike here, did not allege contamination with COVID-19. Nevertheless, *MacMiles* acknowledged that "damage to property exists. . . where damage 'unnoticeable to the naked eye render[s] the property entirely useless and uninhabitable.'" *Id. *4* (citation omitted). Further, the concurrence in *MacMiles* explained the different results in the two cases were based on differences in the policy language, without specifying those differences. *See id.* at *8 (Padilla, J. concurring).

with allegations concerning COVID-19's persistence on surfaces, were sufficient to allege physical loss or damage to property. *Id.* at *7-8.

3. *Philadelphia Eagles LP v. Factory Mut. Ins. Co*. and *SPF Owner LLC and Philadelphia 76ers, L.P. v. Hartford Fire Ins. Co*, No. CV 21-1776, 2022 WL 17721040 (E.D. Pa. Dec. 15, 2022), attached hereto as Exhibit D. In *Philadelphia Eagles*, the United States District Court for the Eastern District of Pennsylvania ordered the parties to proceed to discovery, which supports Fisher's argument that the trial court should have allowed discovery to proceed prior to deciding Hartford's motion for summary judgment. (Br. 34-35; Reply 14 n.35.) The district court took notice of Pennsylvania's differing appellate decisions in *MacMiles* and *Ungarean* and stated that "it would be fair to allow the Plaintiffs to commence limited discovery to at least get some 'beachhead' of facts in the possession of the Defendants that may be informative if it is eventually held, under authoritative court decision and based on Pennsylvania Law, that either of these policies have some ambiguity or that any of the other Plaintiffs' theories are allowed to proceed. Fairness to the Plaintiffs without undue prejudice to the Defendants, warrants discovery." *Id*. at *10.

4. *Hawaii Theatre Center v. Am. Ins. Co*., Civ. No. 1CCV-22-0000340, slip. op. (Hawai'i 1st Cir. Ct. Oct. 10, 2022), attached hereto as Exhibit E, and ***Panda Restaurant Grp., Inc. v. Lexington Ins. Co*., No. A-22-849969-B, slip op. (Nev. Dist. Ct., Nov. 21, 2022)**, attached hereto as Exhibit F.

Hawaii Theatre and *Panda Restaurant Group* are two recent trial court decisions which denied motions to dismiss where – like here – there were allegations regarding the presence of COVID-19 on the insured's premises. These two decisions support Fisher's argument (Br. 20-22, 31-32; Reply 4-5, 8-9) that the contamination of its property with COVID-19 constitutes physical loss of or damage to property.

* * * * *

We respectfully request that the Court consider the foregoing in connection with Fisher's pending appeal.

DEFENDANTS-APPELLANTS

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EXHIBIT A

2022 WL 17334365
Superior Court of Pennsylvania.

Timothy A. UNGAREAN, DMD d/b/a Smile Savers Dentistry, PC, Individually and on Behalf of a Class of Similarly Situated Persons
v.
CNA and Valley Forge Insurance Company, Appellants
Timothy A. Ungarean, DMD d/b/a Smile Savers Dentistry, PC, Individually and on Behalf of a Class of Similarly Situated Persons
v.
CNA and Valley Forge Insurance Company, Appellants

No. 490 WDA 2021, No. 948 WDA 2021
|
Argued April 20, 2022
|
Filed November 30, 2022

Appeal from the Order Entered March 26, 2021, In the Court of Common Pleas of Allegheny County, Civil Division, at No(s): GD-20-006544, Christine A. Ward, J.

Attorneys and Law Firms

Ilana H. Eisenstein, Philadelphia, for appellant.

James C. Haggerty, Philadelphia, for appellee.

Scott B. Cooper, Harrisburg, for appellee.

BEFORE: PANELLA, P.J., BENDER, P.J.E., BOWES, J., LAZARUS, J., STABILE, J., KUNSELMAN, J., NICHOLS, J., McLAUGHLIN, J., and KING, J.

Opinion

OPINION BY PANELLA, P.J.:

***1** Like so many other businesses, the dental practice of Timothy Ungarean, DMD, d/b/a Smile Savers Dentistry, PC ("Ungarean") suffered significant losses when business was disrupted by the COVID-19 pandemic. Ungarean sought coverage for those losses under the business interruption provisions of the business insurance policy he had bought from CNA and Valley Forge Insurance Company ("CNA") ("CNA Policy"). After CNA denied his claim, Ungarean filed a complaint seeking a declaration under the Declaratory Judgments Act, 42 Pa.C.S.A. §§ 7531-7541, that the CNA Policy covered his loss. Ungarean followed that complaint with a motion for summary judgment, which the Allegheny County Court of Common Pleas granted. The court declared Ungarean was entitled to business interruption coverage because COVID-19 and the related governmental orders had caused Ungarean to suffer a direct physical loss of his dental practice, which was within the ambit of coverage provided by the CNA Policy. Moreover, the court found that the exclusions CNA tried to invoke to deny coverage were not applicable to Ungarean's claim.

We are in full agreement with the court's conclusions. We are also in full agreement with the court's reasoning in support of those conclusions. Therefore, based primarily on the trial court's thoughtful opinion, we affirm the court's order granting summary judgment and declaring that coverage is owed to Ungarean for his COVID-related business losses under the specific terms of the CNA Policy. [1]

[1] Given our reliance on the trial court's opinion, we have attached a copy of that opinion to this one.

The bulk of the factual background leading to this appeal is uncontroverted. Ungarean owns and operates a dental practice, with an office in Pittsburgh and an office in Aliquippa. The practice of dentistry necessarily requires close contact not only between the dentist and his patients, but also between the patients and various staff at the office.

To protect himself from unforeseen interruptions of his practice, Ungarean procured an insurance policy from CNA that provided coverage for certain losses associated with the dental practice during the year from April 1, 2019, to April 1, 2020. In March 2020, the state of Pennsylvania was struck by the full force of the COVID-19 pandemic. COVID-19 is a novel contagious virus that can cause severe acute respiratory illness. In the first three months of the pandemic, it killed thousands of Pennsylvanians, and over 100,000 people nationwide.

After consulting with public health experts, Governor Tom Wolf issued several orders in March 2020 directing that all non-essential businesses should close until further notice. Further, the Governor issued an order directing the residents

of Allegheny County, which contains the city of Pittsburgh, to stay at home.

In addition to these shutdown orders, public health officials implemented masking and social distancing protocols. Even those businesses that were deemed essential were required to modify their business models by decreasing the number of people allowed in buildings and requiring people to remain masked. Furthermore, in these early months, enhanced cleaning protocols were implemented due to fears that the virus could linger for days on hard surfaces.

***2** As a result of the pandemic, Ungarean was forced to close his dental practice to the public except for emergency dental procedures. He claims this caused a drastic loss in income from the practice, causing him to furlough employees and suffer other harmful consequences. As a result, Ungarean filed a claim with CNA for these losses under the CNA Policy which provides coverage for, *inter alia,* loss of business income due to the physical loss of or damage to covered property. CNA denied coverage on the basis that Ungarean's dental practice did not suffer physical damage.

Ungarean filed a class action complaint asserting one count of relief under the Declaratory Judgments Act. *See* Complaint, 6/5/20, at ¶ 77. In essence, Ungarean sought a declaration that his pandemic-related business losses were covered under the CNA Policy's Business Income, Extra Expense and Civil Authority provisions. ***See id.*** at ¶¶ 7, 31, 34. Ungarean subsequently filed a motion for summary judgment, which the trial court granted on the basis that Ungarean had, in fact, suffered a direct physical loss of his dental practice and was therefore owed business insurance coverage under the policy.[2] CNA filed a timely notice of appeal and raises two issues:

> 1. Whether [Ungarean] is entitled to business insurance coverage under the [CNA Policy] as a result of the Covid-19 pandemic and associated orders issued by Governor Wolf where [Ungarean] did not suffer "direct physical loss of or damage to" property and no order, issued as a result of "direct physical loss of or damage to" property, prohibited access to [Ungarean's] property, which are required to trigger coverage under the policy?
>
> 2. Whether the Contamination, Consequential Loss, Fungi, Wet Rot, Dry Rot, and Microbes, and Acts of Decisions, Ordinance or Law exclusions in the [CNA Policy] bar coverage for [Ungarean's] alleged losses related to the Covid-19 pandemic and associated orders issued by Governor Wolf?

Brief for Appellant at 2 (trial court's answers and suggested answers omitted).

[2] The same order denied the cross-motion for summary judgment that CNA had also filed. Normally, the denial of a motion for summary judgment is not a final order and therefore is not immediately appealable as a collateral order. *See* Pa.R.A.P. 341. However, in the context of an action under the Declaratory Judgments Act, the trial court's order denying CNA's motion for summary judgment is part and parcel of its order declaring that Ungarean was entitled to coverage under his insurance policy with CNA. Therefore, both the grant of summary judgment to Ungarean and the denial of summary judgment to CNA constitute final orders in this matter. ***See Gen. Acc. Ins. Co. of America v. Allen***, 547 Pa. 693, 692 A.2d 1089, 1095 (1997). Historically, courts often resolve insurance coverage disputes under the Declaratory Judgments Act through summary judgment. ***See Kline v. Travelers Pers. Sec. Ins. Co.***, 223 A.3d 677, 685 (Pa. Super. 2019).

At the core, CNA challenges the trial court's declaration under the Declaratory Judgments Act that Ungarean was entitled to coverage under the CNA Policy. "The purpose of the Declaratory Judgments Act is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]" ***Allen***, 692 A.2d at 1092-93. "In reviewing a declaratory judgment action, we are limited to determining whether the trial court clearly abused its discretion or committed an error of law." ***Kline***, 223 A.3d at 684. We review the trial court's decision "as we would a decree in equity." ***Id***. As such, we defer to the factual findings of the trial court unless they are unsupported in the record. ***See id***. In contrast, we give no such deference to the trial court's application of the law. ***See id***.

3** In this action, Ungarean sought to settle whether the CNA Policy covered his losses arising from the COVID-19 pandemic. This presents a question of law for our review. ***See Kramer v. Nationwide Prop. and Casualty Ins. Co., 271 A.3d 431, 436 (Pa. Super. 2021). In conducting that review, we are mindful that "disputes over coverage must be resolved only by reference to the provisions of the policy itself." ***Id.*** (citation omitted). It is therefore imperative that we look to the text of

the CNA Policy, because just as in every case in which an insured claims business related losses caused by COVID-19, each individual policy must be examined based solely on its own language.

Business Income and Extra Expense Provisions

The trial court first found that Ungarean was entitled to coverage under the CNA Policy's Business Income and Extra Expense provisions, which state in relevant part:

> 1.b. We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. ...
>
> 2.a. Extra Expense means reasonable and necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss.

CNA Policy, Business Income and Extra Expense Endorsement, at 1.b., 2a. The policy defines "suspension" as "[t]he partial or complete cessation of your business activities; or ... [t]hat a part or all of the described premises is rendered untenantable." CNA Policy, Businessowners Special Property Coverage Form, at G.29. Further, the policy defines "operations" as "the type of your business activities occurring at the described premises and tenantability of the described premises." ***Id.***, at G.19.

"Direct physical loss of or damage to"

The provisions provide coverage for the loss of business income and extra expenses incurred due to the suspension of an insured's operations caused by a "direct physical loss of or damage to" the covered property. ***See*** CNA Policy, Business Income and Extra Expense Endorsement, at 1.b., 2a. As the trial court makes clear, whether Ungarean's claim is covered under these provisions of the CNA Policy hinges on the meaning of the phrase "direct physical loss of or damage to property." Trial Court Opinion, 3/25/21, at 10. CNA argues that the phrase necessarily requires a physical alteration to the subject property, and any other interpretation is unreasonable. Ungarean, meanwhile, argues that it is reasonable to interpret the phrase as encompassing the loss of use of the property even in the absence of actual physical harm to the property.

Importantly, the CNA Policy does not define "direct," "physical," "damage," and, perhaps most significantly in our view, "loss." The trial court therefore turned to the dictionary definitions of these words to determine whether Ungarean's interpretation of the phrase as including the loss of use of his property was a reasonable one. ***See*** ***Wagner v. Erie Ins. Co.***, 801 A.2d 1226, 1231 (Pa. Super. 2002) (stating that courts may utilize dictionary definitions to inform its understanding of the language of a contract). The court emphasized that this determination was crucial because "if the contractual terms are subject to more than one reasonable interpretation, [the] [c]ourt must find that the contract is ambiguous," and ambiguous provisions must be construed in favor of Ungarean as the insured. Trial Court Opinion, 3/25/21, at 10-11 *(citing* ***Madison Constr. Co. v. Harleysville Mutual Ins. Co.***, 557 Pa. 595, 735 A.2d 100, 106 (1999), and ***Kurach v. Truck Ins. Exchange***, 235 A.3d 1106, 1116 (Pa. 2020)). Ungarean's interpretation of an ambiguous contract need only be reasonable to be controlling. ***See*** ***Collister v. Nationwide Life Ins. Co.***, 479 Pa. 579, 388 A.2d 1346, 1353 (1978); ***see also*** ***Consol. Rail Corp. v. ACE Prop. & Casualty Ins. Co.***, 182 A.3d 1011, 1026 (Pa. Super. 2018).

***4** In finding that Ungarean's interpretation was, at the very least, reasonable considering the ordinary meaning of the operative words, the trial court explained:

> This [c]ourt [begins] its analysis [of what the phrase 'direct physical loss of .... property' reasonably means] with the terms 'damage' and 'loss,' as these terms are the crux of the disputed language. ... '[D]amage' is defined as 'loss or harm resulting from injury to person, property, or reputation.' and 'loss' is defined as 'DESTRUCTION, RUIN ... [and/or] the act of losing possession [and/or] DEPRIVATION ...
>
> Based upon the above-provided definitions, it is clear that 'damage' and 'loss,' in certain contexts, tend to overlap. This is evident because the definition of 'damage' includes the term 'loss,' and at least one definition of 'loss' includes the terms 'destruction' and 'ruin,' both of which indicate some form of damage. However, [ ] in the context of this [CNA Policy], the concepts of 'loss' and 'damage' are separated by the disjunctive 'or,' and, therefore, the terms must mean something different from each other. Accordingly, in this instance, the most

> reasonable definition of 'loss' is one that focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of damage to property, *i.e.,* destruction and ruin. Applying this definition gives the term 'loss' meaning that is different from the term 'damage.' Specifically, whereas the meaning of the term 'damage' encompasses all forms of harm to [Ungarean's] property (complete or partial), this [c]ourt conclude[s] that the meaning of the term 'loss' reasonably encompasses the act of losing possession [and/or] deprivation, which includes the loss of use of property absent any harm to [the] property.

Trial Court Opinion, 3/25/21, at 12-13 (capitalization and some ellipses in original, footnotes citing Merriam-Webster Dictionary for definitions of terms omitted).

The trial court's reasoning is both straightforward and compelling. The CNA Policy provides coverage for "direct physical loss of or damage to the property...." CNA, as the insurer, wrote that phrase in the disjunctive, meaning that "direct physical loss" must mean something different from "direct physical damage." ***See In re Paulmier***, 594 Pa. 433, 937 A.2d 364, 373 (2007) (stating that " 'or' is disjunctive. It means one or the other of two or more alternatives."). The definition of "loss" includes the loss of possession or deprivation of the property, whereas damage does not; it is therefore reasonable to find that "loss of property" includes the act of being deprived of the physical use of one's property. We are convinced the trial court's reasoning is correct, and results in a reasonable interpretation of the CNA Policy. ***See Collister***, 388 A.2d at 1353; ***Consol. Rail Corp.***, 182 A.3d at 1026.

CNA argues, however, that the trial court's analysis is fatally flawed because it writes the words "physical" and "direct" out of the contract. To the contrary, the trial court explained that it had:

> also considered the meaning and impact of the terms 'direct' and 'physical.' Ultimately, [the court] determined that the ordinary, dictionary definitions of the terms 'direct' and 'physical' are consistent with the above interpretation of the term 'loss.' ... '[D]irect' is defined as 'proceeding from one point to another in time or space without deviation or interruption ... [and/or] characterized by close logical, causal, or consequential relationship ...' and 'physical' is defined as 'of or relating to natural science ... having a material existence ... [and/or] perceptible especially through the senses and subject to the laws of nature....' Based upon these definitions it is certainly reasonable to conclude that [Ungarean] could suffer 'direct' and 'physical' loss of use of [his] property absent any harm to [the] property.
>
> ***5** Here, [Ungarean's] loss of use of [his] property was both 'direct' and 'physical.' The spread of COVID-19, and a desired limitation of the same, had a close logical, causal and/or consequential relationship to the ways in which [Ungarean] materially utilized [his] property and physical space. ... Indeed, the spread of COVID-19 and social distancing measures (with or without the Governor's orders) caused [Ungarean], and many other businesses, to *physically* limit the use of property and the number of people that could inhabit *physical* buildings at any given time. Thus, the spread of COVID-19 did not, as [CNA] contend[s], merely impose economic limitations. Any economic losses were secondary to the businesses' *physical* losses.

Trial Court Opinion, 3/25/21, at 13-14 (emphasis and some ellipses in original, footnotes citing Merriam-Webster Dictionary for definitions of terms omitted).

We agree with the trial court that it is, at a minimum, reasonable to find that Ungarean's loss of the use of his dental practice due to COVID-19 and the governmental orders equated to a direct physical loss of his property. ***See Collister***, 388 A.2d at 1353; ***Consol. Rail Corp.***, 182 A.3d at 1026. In fact, to say otherwise not only ignores the reality of the impact COVID-19 had on businesses and the world at large but ignores the dictionary definitions of the words in the CNA Policy which, as written, reasonably encompass the direct physical loss of the use of one's property due to COVID-19 and the physical restrictions placed on properties because of it. [3]

[3] Although not applicable here, another way insureds may demonstrate that they have satisfied the "direct physical loss or damage" to covered property is by invoking the contamination theory so aptly explained by another well-reasoned trial court opinion in ***SWB Yankees v. CNA Fin. Corp.***, 2021 WL 3468995 (Lackawanna Ct. Com. Pl. August 4, 2021). There, the court explained that if an insured alleges the actual presence of COVID-19 on its property caused the property to become uninhabitable or unusable, it has "adequately alleged 'physical loss or damage' to its property

under the contamination theory for purposes of business interruption insurance coverage. ***Id***. at *21. Ungarean did not allege that COVID-19 was present in his dental practice.

Period of Restoration

CNA points out, however, that the Business Income and Extra Expense provisions state that CNA will pay for actual loss or reasonable and necessary expenses during the "period of restoration." CNA asserts the definition of "period of restoration" in the policy only lends support to its argument that "physical loss or damage" requires a physical alteration to the property and because that did not happen here, Ungarean did not suffer a direct physical loss of his dental practice. The policy defines "period of restoration" as:

> the period of time that ... [b]egins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and ... [e]nd on the earlier of ... [t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or ... [t]he date when business is resumed at a new permanent location.
>
> Period of restoration does not include any increased period required due to the enforcement of any law that ... [regulates the construction, use or repair, or requires the tearing down of any property; or ... [r]egulates the prevention, control, repair, clean-up or restoration of environmental damage.
>
> The expiration date of this policy will not cut short the "period of restoration."

CNA Policy, Businessowners Special Property Coverage Form, at G.20.

In rejecting CNA's argument, the trial court concluded that the "period of restoration" provisions are most reasonably construed as time limits for coverage, and do not otherwise alter the definition of "physical loss or damage." *See* Trial Court Opinion, 3/25/21, at 15. We agree and are therefore unpersuaded by CNA's argument that the definition of "period of restoration" should somehow alter our conclusion that Ungarean suffered a physical loss to his dental practice and is consequently entitled to coverage. [4]

[4] Furthermore, as the trial court noted, COVID-19 has necessitated many physical changes to business properties that would constitute repairs or rebuilding. ***See id***. at 15-16. "Such changes include, but are not limited to, the installations of partitions, additional handwashing/sanitization stations, and the installations or renovation of ventilation systems." ***Id.*** at 15.

"Covered Cause of Loss"

6** This does not, however, end our analysis as the CNA Policy also states that "[t]he loss or damage must be caused by or result from a Covered Cause of Loss." CNA Policy, Business Income and Extra Expense Endorsement, at 1.b.; ***see also id. at 2.a. ("Extra Expense means reasonable and necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss."). The CNA Policy defines "Covered Causes of Loss" as follows: "RISKS OF DIRECT PHYSICAL LOSS unless the loss is: a. Excluded in section B. EXCLUSIONS; b. Limited in paragraph A.4. Limitations; or c. Excluded or limited by other provisions of this policy." CNA Policy, Businessowners Special Property Coverage Form, at A.3. (emphasis in original).

Here, CNA does not raise any argument related to Paragraph A.4 or indicate that the loss was excluded or limited under other provisions of the CNA Policy. Instead, CNA points to a variety of exclusions in Section B of the CNA Policy and maintains each of these exclusions relieves it of any obligation to cover Ungarean's lost business income and extra expenses from the pandemic-related loss of his dental practice. These exclusions include contamination; consequential loss; fungi, wet rot, dry rot, and microbes; ordinance or law; government actions; and acts or decisions.

It is well settled that when the insurer relies upon exclusionary language in the policy as a defense, the burden is upon the insurer to prove that the exclusion applies to the facts of the case. ***See McEwing v. Lititz Mut. Ins. Co.***, 77 A.3d 639, 646 (Pa. Super. 2013) (stating that the insured has the initial burden of showing a claim falls within a policy's coverage, but the burden then shifts to the insurer to prove the applicability of any exclusions); *Wagner,* 801 A.2d at 1231 (providing that the insurer must show that an asserted exclusion clearly and unambiguously prevents the coverage

of a claim). To sustain that burden, CNA "must prove that the language of the insurance contract is clear and unambiguous; otherwise, the provision will be construed in favor of the insured." ***Wagner***, 801 A.2d at 1231. Importantly, insurance coverage is interpreted broadly to afford the greatest possible protection to the insured; concomitantly, exclusionary clauses are interpreted narrowly against the insurer. ***See Kropa v. Gateway Ford***, 974 A.2d 502, 505-07 (Pa. Super. 2009); ***Pecorara v. Erie Ins. Exch.***, 408 Pa.Super. 153, 596 A.2d 237, 239 (1991).

Ambiguity in Exclusions Provisions

As a preliminary matter, the parties acknowledge that Ungarean seeks coverage under the CNA Policy's Business Income and Extra Expense provisions. The CNA Policy's stated exclusions include four distinct categories of exclusions. ***See*** CNA Policy, Businessowners Special Property Coverage Form, at B.1.-4. CNA cites to exclusions in the first three categories and wholly ignores that the fourth category expressly limits its application to "Business Income and Extra Expense Exclusions." ***Id***. at B.4.

As noted above, when a claim is made under the CNA Policy, coverage under the Business Income and Extra Expense insurance is restricted to situations where "[t]he loss or damage [is] caused by or result from a Covered Cause of Loss." CNA Policy, Business Income and Extra Expense Endorsement, at 1.b., 2.a. "Covered Cause of Loss" broadly cites to Section B. (Exclusions) and does not differentiate between the four categories of Exclusions. ***See*** CNA Policy, Businessowners Special Property Coverage Form, at A.3.

However, based upon the language in the CNA Policy, an insured, such as Ungarean, could reasonably conclude that the Business Income and Extra Expense Exclusions, as stated in the fourth category, and not the first three categories of exclusions, are the only exclusions which apply to claims under the Business Income and Extra Expense coverage provisions. CNA's contention that all four of the categories of exclusions apply to claims for Business Income and Extra Expense insurance, based upon the definition of "Covered Cause of Loss" and its broad statement citing to Section B. (Exclusions) as a whole, is unreasonable when considering the express words of the policy. In fact, CNA's interpretation would mean that the inclusion of the words "Business Income and Extra Expense Exclusions" in the CNA Policy was entirely superfluous, amounting to no more than mere surplusage. ***See*** CNA Policy, Businessowners Special Property Coverage Form, at B.1.-4; ***Millers Capital Ins. Co. v. Gambone Bros. Dev. Co.***, 941 A.2d 706, 716 (Pa. Super. 2007) (stating that when courts must choose between two competing interpretations of an insurance policy, "we are bound, as a matter of law, to choose the interpretation which allows us to give effect to all of the policy's language). Such inconsistent language used in relation to different identified forms of exclusions, covered under different provisions of the CNA Policy, necessarily creates an ambiguity in the policy. ***See Bishops, Inc. v. Penn Nat. Ins.***, 984 A.2d 982, 992 (Pa. Super. 2009) (finding an ambiguity in an insurance policy based upon contradictory or necessarily inconsistent language in different portions of the policy).

***7** Here, Ungarean purchased the CNA Policy, which provided him with two categories of property insurance—Businessowners Covered Property insurance and Business Income and Extra Expense insurance. Ostensibly, if Ungarean sought coverage under the Businessowners Covered Property insurance, the first three categories of Exclusions would be applicable, but by the plain language of the CNA Policy, the "Business Income and Extra Expense Exclusions" would be inapplicable. Moreover, only with the inclusion of a claim for loss of business income would the fourth category of exclusions — "Business Income and Extra Expense Exclusions"— be triggered.

When insurance policy language is ambiguous, courts examine whether a finding of coverage is consistent with the objectively reasonable expectations of the insured. ***See id***. at 990. In making this determination, courts must examine the totality of the disputed policy language. ***See id***.

When viewing the CNA Policy as a whole, and keeping in mind that we must interpret the relevant provisions in favor of the insured and read the exclusionary clauses narrowly against the insurer, we find that the only exclusion applicable to Ungarean's Business Income and Extra Expense insurance claim is the provision for "Business Income and Extra Expense Exclusions". [5]

5 Although neither party cites to this exclusion, it is well settled that the insurer bears the burden to establish the applicability of any exclusion to deny coverage. ***See McEwing***, 77 A.3d at 646.

The CNA Policy defines "Business Income and Extra Expense Exclusions" as follows:

a. We will not pay for:

(1) Any Extra Expense, or increase of Business Income loss, caused by or resulting from:

(a) Delay in rebuilding, repairing or replacing the property or resuming "operations," due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or

(b) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the suspension of "operations," we will cover such loss that affects your Business Income during the "period of restoration."

b. Any other consequential loss.

CNA Policy, Businessowners Special Property Coverage Form, at B.4.

Here, subsection a. is clearly inapplicable to the facts of this case. Regarding subsection b. — "Any other consequential loss"— the CNA Policy in a separate exclusion defines "consequential loss" as "[d]elay, loss of use or loss of market." CNA Policy, Businessowners Special Property Coverage Form, at B.2.b.

If we were to find that subsection b. of the "Business Income and Extra Expense Exclusions" is applicable to this case, we would necessarily vitiate Business Income and Extra Expense coverage *in its entirety. See* Trial Court Opinion, 3/25/21, at 28. Here, as explained above, the CNA Policy can reasonably be interpreted to find that the "loss of property" includes the act of being deprived of the physical use of one's property. Accordingly, the consequential loss exclusion "would effectively eliminate coverage for any kind of loss and/or damage caused by any covered peril." ***Id.*** Given this result, we cannot conclude that the exclusion for consequential loss under the "Business Income and Extra Expense Exclusions" is applicable so as to prevent coverage.

Based on all of the above, we find that the loss in this case is a "Covered Cause of Loss" as specified in the CNA Policy as none of the exclusions in the Business Income and Extra Expenses Exclusions category, the only category of Exclusions available to CNA for the Business Income and Extra Expense claim made here, is applicable.

Other Exclusions Under Section B

8** Nevertheless, even if we were to address CNA's arguments regarding the exclusions in the first three categories of Section B. (Exclusions), we agree with the trial court that none of the cited exclusions apply. First, CNA argues the "Contamination by other than pollutants" exclusion applies to the instant case. *See* Brief for Appellant at 38-39. CNA contends this exclusion applies to any loss resulting from contamination, including mitigation efforts. ***See id. at 38. CNA claims that the losses here are an "indirect" result of COVID-19 contamination. *See id.* at 39.

The contamination exclusion in the CNA Policy precludes coverage for "Contamination by other than pollutants." CNA Policy, Businessowners Special Property Coverage Form, at B.2.d.8. In turn, the CNA Policy defines "pollutants" as follows:

> any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste, and any unhealthy or hazardous building materials (including but not limited to asbestos and lead products or materials containing lead). Waste included material to be recycled, reconditioned, or reclaimed.

Id., at G.21.

As an initial matter, the contamination exclusion contains an ambiguity, given that it seeks to exclude pollutants while at the same time including "contaminant" in the definition of pollutants. ***See Wagner***, 801 A.2d at 1231 (stating that an ambiguity in the insurance policy must be construed against the insurer). However, setting aside this ambiguity, we agree with the trial court that this exclusion does not apply, and adopt its reasoning supporting that conclusion in full. ***See*** Trial Court Opinion, 3/25/21, at 21-24. Furthermore, CNA has not established, through any pertinent case law, that an "indirect" connection between the exclusion and the loss renders the exclusion applicable. As noted above, Ungarean neither alleged nor introduced evidence that the COVID-19 virus was present at the dental offices. Accordingly, we reject

CNA's contention that the "Contamination by other than pollutants" exclusion prevents coverage of Ungarean's claim.

Next, CNA argues that the consequential loss exclusion applies. ***See*** Brief for Appellant at 39-41. CNA claims the trial court misinterpreted this exclusion by finding that the exclusion would render the Business Income and Extra Expense coverages illusory. ***See id***. at 39-40. To that end, CNA contends that when the trigger for coverage includes a tangible change to the property, and not mere loss of use, the exclusion is not illusory and reinforces its position that a "non-tangible loss of use was never intended to be covered under the policy." ***Id.*** at 40. In support, CNA cites to various cases interpreting similar language. ***See id***. at 40-41.

Given that we have rejected CNA's underlying argument that Ungarean did not suffer a direct physical loss to his dental practices, we likewise reject this contention which is premised on that underlying argument. Moreover, we do not find any of the cases cited by CNA to be availing, as the "loss of property" language in the CNA Policy, unlike the policies in the cited cases, includes the act of being deprived of the physical use of one's property. Therefore, we also find that the consequential loss exclusion is not applicable.

Next, CNA contends that the "fungi, wet rot, dry rot, and microbes" exclusion applies to this case. ***See*** Brief for Appellant at 42-43. CNA argues that the trial court's interpretation of the exclusion is tortured and manufactures an ambiguity. ***See id***.

9** We disagree. To the contrary, we agree with the trial court that the exclusion does not apply to the facts of this case and adopt its analysis in full. *See* Trial Court Opinion, 3/25/21, at 24-26. We add that CNA's argument that the trial court manufactured an ambiguity is without merit, given that the CNA Policy defines "microbe" but fails to include *virus* in this definition. ***See Wagner, 801 A.2d at 1231 (stating that when construing an insurance policy, courts must construe words of common usage in their natural, plain, and ordinary sense and may inform the understanding of these terms by accounting for their dictionary definitions). [6] Based upon the foregoing, CNA has not met its burden of establishing that this exclusion is applicable.

[6] The CNA Policy at issue here does not contain a virus exclusion. If it had, such an exclusion would most likely have ended our inquiry and compelled a conclusion different from the one reached by the trial court and affirmed by this Court.

CNA also attempts to invoke the "Ordinance or Law" exclusion. ***See*** Brief for Appellant at 44-45. CNA asserts that Governor Wolf's COVID-19 orders had the force of law and exclude coverage under that exclusion. ***See id***.

The exclusion states the following:

> a. Ordinance or Law
>
> (1) The enforcement of any ordinance or law:
>
> (a) Regulating the construction, use or repair of any property; or
>
> (b) Requiring the tearing down of any property, including the cost of removing its debris.
>
> (2) This exclusion applies whether the loss results from:
>
> (a) An ordinance or law that is enforced even if the property has not been damaged; or
>
> (b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

CNA Policy, Businessowners Special Property Coverage Form, at 1.a.

The inclusion of "construction" and "repair" with "use" indicates "that the exclusion relates to the physical structural integrity of the property." ***Frank Van's Auto Tag, LLC v. Selective Ins. Co. of the Se.***, 516 F. Supp. 3d 450, 461 (E.D. Pa. 2021); ***see also Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.***, 506 F. Supp. 3d 360, 380 (E.D. Va. 2020) ("[I]t is clear that the Ordinance or law Exclusion applies to ordinances related to the structural integrity, maintenance, construction, or accessibility due to the property's physical structural state, which existed *before*.") (emphasis in original). [7] Here, the physical structural integrity of the properties is not at issue and, thus, the narrow application of this exclusion is unavailable to CNA.

[7] Such an interpretation is seemingly confirmed by the "Ordinance or Law" endorsement, which states that "[t]he ordinance or law referred to in this

> Additional Coverage is an ordinance or law that ... [r]egulates the demolition, construction or repair of buildings, or establishes zoning or **land use** requirements at the described premises; and ... [i]s in force at the time of the loss." CNA Policy, Ordinance or Law, at 2 (emphasis added).

In any event, even if CNA could establish that "use" in the exclusion applies to this case, we agree with the trial court that Ungarean's claim "for coverage is based upon losses and expenses [he] suffered in relation to both 'the Covid-19 pandemic and the actions of the government in response thereto.' " Trial Court Opinion, 3/25/21, at 29 (emphasis omitted). It was "COVID-19 and the related social distancing measures (with or without government orders) [which] directly forced businesses everywhere to physically limit the use of property and the number of people that could inhabit physical buildings at any given time." ***Id***. Accordingly, the Ordinance or Law exclusion is not available to CNA on this basis as well.

10** Finally, CNA baldly raises a claim that the Acts or Decisions and Governmental Actions exclusions are applicable. ***See Brief for Appellant at 44.

The Acts or Decisions exclusion states that the insurer "will not pay for loss or damage caused by or resulting from ... acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." CNA Policy, Businessowners Special Property Coverage Form, at B.3.b. Pertinently, if the excluded cause of loss listed in paragraph b. "results in a Covered Cause of Loss, [CNA] will pay for the loss or damage caused by that Covered Cause of Loss." ***Id***.

The plain language of this exclusion conflicts with the definition of Covered Cause of Loss. As noted above, the CNA Policy defines "Covered Causes of Loss" as follows:

> RISKS OF DIRECT PHYSICAL LOSS unless the loss is:
>
> a. Excluded in section B. EXCLUSIONS;
>
> b. Limited in paragraph A.4. Limitations; or
>
> c. Excluded or limited by other provisions of this policy.

Id., at A.3. By the plain language of the CNA Policy, a loss cannot be a Covered Cause of Loss if an exclusion in Section B. applies. However, the Acts or Decisions exclusion will cover an excluded loss if the loss is a Covered Cause of Loss. These two sections are in conflict, as a loss excluded by the Acts or Decisions exclusion would never qualify as a Covered Cause of Loss. Accordingly, the exclusion contains an ambiguity and therefore cannot be used by CNA to deny Ungarean coverage.

Moreover, the Governmental Actions exclusion denies coverage for "loss or damage caused directly or indirectly by ... destruction of property by order of government authority." ***Id.,*** at B.1.c. Here, the Governmental Actions exclusion does not apply because no governmental authority ordered the destruction of Ungarean's properties.

In sum, as for the exclusions, we find in the first instance that the ambiguity created by Section B. Exclusions means only the fourth category of exclusions, under the heading of "Business Income and Extra Expense Exclusions," is available for CNA to invoke against Ungarean's claim under the Business Income and Extra Expense provisions. None of those exclusions are applicable to Ungarean's claim. Nonetheless, even if the exclusions under the three other Exclusions sections not labeled "Business Income and Extra Expense Exclusions" were available to CNA, we agree with the trial court that those exclusions are also not applicable and cannot absolve CNA of its responsibility to provide coverage for Ungarean's losses.

Therefore, we conclude that the trial court properly declared that CNA was obligated to provide business loss and extra expenses coverage to Ungarean for the direct physical loss of his dental practice that he suffered due to COVID-19 and the governmental orders issued in response to the pandemic.

Civil Authority Provision

The trial court also found that Ungarean was entitled to coverage under the Civil Authority Provision in the CNA Policy, which states:

> When the Declarations show that you have coverage for Business Income and Extra Expense, you may extend that insurance to apply to the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by action of civil authority that prohibits access

> to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss.

***11** CNA Policy, Civil Authority, at 1.

As we agree with the trial court that Ungarean has established a claim that he suffered a "physical loss of or damage to covered property," we also agree with the trial court that he has established a claim under the Civil Authority Endorsement. ***See*** Trial Court Opinion, 3/25/21, at 19-20.

Conclusion

We affirm the trial court's order granting Ungarean's motion for summary judgment and its declaration that Ungarean's direct physical loss to his dental practice is covered by the CNA Policy. We recognize, as CNA has taken great pains to point out, that this conclusion runs against the tide of cases finding an insured was not owed COVID-related business interruption coverage under their policy's provisions. However, as we stressed above, our review must be confined to the CNA policy purchased by Ungarean to determine whether coverage has been triggered. We base our finding that coverage has indeed been triggered on the plain language of the CNA policy, the guiding principle that ambiguities in insurance policies such as the ones we identified in the CNA Policy must be construed in favor of the insured, and the analysis and opinion of the trial court.

Order affirmed.

Judges Lazarus, Kunselman, Nichols, and McLaughlin join the Opinion.

Judge Stabile files a dissenting opinion in which President Judge Emeritus Bender, and Judges Bowes and King join.

Exhibit B

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

TIMOTHY A. UNGAREAN, DMD d/b/a SMILE SAVERS DENTISTRY, PC, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS, Plaintiff,

v.

CNA and VALLEY FORGE INSURANCE COMPANY, Defendants.

CIVIL DIVISION

No.: GD-20-006544

Memorandum and Order of Court

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

TIMOTHY A. UNGAREAN, DMD d/b/a SMILE SAVERS DENTISTRY, PC, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS, Plaintiff,

v.

CNA and VALLEY FORGE INSURANCE COMPANY, Defendants.

CIVIL DIVISION

No.: GD-20-006544

Memorandum and Order of Court

MEMORANDUM AND ORDER OF COURT

I. The Parties

Timothy A. Ungarean, DMD, d/b/a Smile Savers Dentistry, PC is a dentist who owns and operates a dental practice with places of business located at 4701 Baptist Road, Pittsburgh, Allegheny County, Pennsylvania, 15227 and 3153 Brodhead Road, Suite A, Aliquippa, Beaver County, Pennsylvania, 15001. Timothy A. Ungarean, DMD, is hereinafter referred to as "Ungarean" or "Plaintiff."

***12** CNA is a property and casualty insurance company with a principal place of business at 151 North Franklin Street, Floor 9, Chicago, Illinois 60606.[1] Valley Forge Insurance Company is a wholly owned subsidiary company of CNA, and also provides property and casualty insurance. Both CNA and Valley Forge Insurance Company regularly and routinely conduct business in the Commonwealth of Pennsylvania. CNA and Valley Forge Insurance Company are hereinafter collectively referred to as "Defendants."

1 In their Cross Motions for Summary Judgment, both Valley Forge Insurance Company and CNA argue that CNA is not a proper party in this action. This Court disagrees. After Plaintiff filed its claim with Valley Forge Insurance Company, Plaintiff received a letter that Plaintiff is not entitled to coverage. Plaintiff's Complaint at 174, Exhibit C. Importantly, the letter is written by a Mark Chancellor, who identifies himself as a Claims Representative with CNA. In the letter, Mark Chancellor speaks on behalf of Valley Forge Insurance Company and specifically states that "*[w]e* have evaluated the claim under a CNA Connect Policy issued to Timothy A Ungarean by VFIC ... Policy No, 6025183026 (the "Policy")." *Id.* at 175, Exhibit C (emphasis added). Given that the initial denial letter came from a CNA Claims Representative, this Court determined that CNA is a proper party in this declaratory judgment action. *See Shared Communications Services of 1800-80 JFK Blvd. Inc. v. Bell Atlantic Properties Inc.*, 692 A.2d 570, 573 (Pa. Super. 1997) (holding that "courts will disregard the corporate entity only in the limited circumstances when *used to defeat public convenience,* justify wrong, protect fraud or defend a crime") (emphasis added).

II. Introduction

In March and April of 2020, in order to prevent and mitigate the spread of the coronavirus disease "COVID-19," Governor Tom Wolf ("Governor Wolf") issued a series of mandates restricting the operations of certain types of businesses throughout the Commonwealth of Pennsylvania (the "Governor's orders"). On March 6, 2020, Governor Wolf issued an order declaring a Proclamation of Disaster Emergency. On March 19, 2020, Governor Wolf issued an order requiring all non-life sustaining businesses in Pennsylvania to cease operations and close physical locations. On March 23, 2020, Governor Wolf issued an order directing Pennsylvania citizens in particular counties to stay at home except as needed to access life sustaining services. Then,

on April 1, 2020, Governor Wolf extended the March 23, 2020 order, and directed all of Pennsylvania's citizens to stay at home. As of April 1, 2020, at least 5,805 citizens of Pennsylvania contracted COVID-19 in sixty counties across the Commonwealth, and seventy-four (74) citizens died. [2] Unfortunately, since April 1, 2020, the number of positive cases and deaths from COVID-19 has increased dramatically. [3]

[2] *See* Governor Tom Wolf, *Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home,* (April 1, 2020), https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf.

[3] As of March 21, 2021, 843,135 citizens of Pennsylvania have contracted COVID-19 and 24,788 citizens have died. *See* Pennsylvania Department of Health, COVID-19 Data for Pennsylvania, https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx.

As a result of the spread of COVID-19 and the Governor's orders, Plaintiff shutdown the majority of its business operations. For a time, Plaintiff's dental practice remained open only to perform emergency dental procedures. Not surprisingly, Plaintiff subsequently experienced a dramatic decrease in business income and furloughed some of its employees. Plaintiff thereafter submitted a claim for coverage under its business insurance policy ("the insurance contract") with Defendants. Defendants denied Plaintiff's claim.

***13** On June 5, 2020, Plaintiff filed a complaint in the Court of Common Pleas of Allegheny County. In its complaint, Plaintiff asserted one count for declaratory judgment, by which it seeks this Court's determination as to whether Plaintiff is entitled to coverage under the insurance contract with Defendants for losses Plaintiff sustained in relation to the spread of COVID-19 and the Governor's orders. On October 5, 2020, Plaintiff filed a Motion for Summary Judgment. On December 2 and December 4, 2020, Defendants filed Cross Motions for Summary Judgment. On January 20, 2020, this Court heard oral argument on Plaintiff's Motion for Summary Judgment and Defendants' Cross Motions for Summary Judgment. For the reasons set forth herein, this Court grants Plaintiff's Motion for Summary Judgment and denies Defendants' Cross Motions for Summary Judgment.

III. The Contract Provisions

Plaintiff's and Defendants' dispute involves the following provisions regarding coverage under the insurance contract.

Business Income

a. Business Income means:

(1) Net Income (Net profit or Loss before Income taxes) that would have been earned or incurred, including:

a. "Rental Value;" and

b. "Maintenance Fees," if you are a condominium association; and

(2) Continuing normal operating expenses incurred, including payroll, subject to 90 day limitation if indicated on the Declaration page.

b. We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss. [4]

Extra Expense

a. Extra Expense means reasonable and necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss.

b. We will pay Extra Expense (other than the expense to repair or replace property) to:

(1) Avoid or minimize the "suspension" of business and to continue "operations" at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement premises or temporary locations; or

(2) Minimize the "suspension" of business if you cannot continue "operations."

c. We will also pay Extra Expense (including Expediting Expenses) to repair or replace the property, but only to

the extent it reduces the amount of loss that otherwise would have been payable under Paragraph 1. Business Income above.

Plaintiff's Complaint, at 58-59, Exhibit B (emphasis added).

Civil Authority

1. When the Declarations show that you have coverage for Business Income and Extra Expense, you may extend that insurance to apply to the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by an action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss.

Id. at 84 (emphasis added).

[4] The insurance contract defines "suspension" as the "partial or complete cessation of your [the insured's] business activities; or ... that a part or all of the described premises is rendered untenantable." Plaintiff's Complaint at 55. The insurance contract defines "operations" as "the type of your [the insured's] business activities occurring at the described premises and tenantability of the described premises." Plaintiff's Complaint at 53. The insurance contract defines "period of restoration" as:

> the period of time that: [b]egins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and ... [e]nds on the earlier of: (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location.

Plaintiff's Complaint at 53. The insurance contract defines Covered Cause of Loss as "RISK OF DIRECT PHYSICAL LOSS unless the loss is: a. Excluded in Section B. Exclusions; b. Limited in paragraph A.4 Limitations; or c. Limited or Excluded by other provision of this Policy. Plaintiff's Complaint at 37.

***14** Plaintiff's and Defendants' dispute also involves the following provisions regarding exclusions from coverage under the insurance contract:

Exclusions

We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Ordinance or Law

(1) The enforcement of any ordinance or law:

(a) Regulating the construction, use or repair of any property; or

(b) Requiring the tearing down of any property, including the cost of removing debris.

(2) This exclusion applies whether the loss results from:

(a) An ordinance or law that is enforced even if the property has not been damaged; or

(b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition or property, or removal of its debris, following a physical loss to that property.

Contamination

Contamination by other than "pollutants." [5]

Consequential Loss

Delay, loss of use or loss of market.

Acts or Decisions

Acts or Decisions, including the failure to act or decide, of any person, group, organization or governmental body.

Id. at 38-42 (emphasis added).

Fungi, Wet Rot, Dry Rot and Microbes [6]

Id. at 118-19 (emphasis added).

5 The insurance contract defines "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste, and any unhealthful or hazardous building materials (including but not limited to asbestos and lead products or materials containing lead). Waste includes materials to be recycled, reconditioned or reclaimed." Plaintiff's Complaint at 54.

6 "Microbe(s)" is specifically defined in the following manner:

> "Microbe(s)" means any non-fungal micro-organism or non-fungal, colony-form organism that causes infection or disease. "Microbes" includes any spores, mycotoxins, odors, or any other substances, products, or by products produced by, or arising out of the current or past presence of "microbes."

Id. at 118-19 (emphasis added).

IV. Standard of Review

It is well-settled that, after the relevant pleadings are closed, a party may move for summary judgment, in whole or in part, as a matter of law. Pa. R.C.P. 1035.2. Summary judgment "may be entered only where the record demonstrates that there are no genuine issues of material fact, and it is apparent that the moving party is entitled to judgment as a matter of law." *City of Philadelphia v. Cumberland County Bd. of Assessment Appeals,* 622 Pa. 581, 81 A.3d 24, 44 (2013). Furthermore, appellate courts will only reverse a trial court's order granting summary judgment where it is "established that the court committed an error of law or abused its discretion." *Siciliano v. Mueller,* 149 A.3d 863, 864 (Pa. Super. 2016).

The interpretation of an insurance contract is a matter of law, which may be decided by this Court on summary judgment. *Wagner. V. Erie Insurance Company,* 801 A.2d 1226, 1231 (Pa. Super. 2002). When interpreting an insurance contract, this Court aims to effectuate the intent of the parties as manifested by the language of the written instrument. *American and Foreign Insurance Company v. Jerry's Sport Center,* 606 Pa. 584, 2 A.3d 526, 540 (2010). When reviewing the language of the contract, words of common usage are read with their ordinary meaning, and this Court may utilize dictionary definitions to inform its understanding. *Wagner,* 801 A.2d at 1231; *see also AAA Mid-Atlantic Insurance Company v. Ryan,* 624 Pa. 93, 84 A.3d 626, 633-34 (2014). If the terms of the contract are clear, this Court must give effect to the language. *Madison Construction Company v. Harleysville Mutual Insurance Company,* 557 Pa. 595, 735 A.2d 100, 106 (1999). However, if the contractual terms are subject to more than one reasonable interpretation, this Court must find that the contract is ambiguous. *Id.* "[W]hen a provision of a[n insurance contract] is ambiguous, the [contract] provision is to be construed in favor of the [the insured] and against the insurer, as the insurer drafted the policy and selected the language which was used therein." *Kurach v. Truck Insurance Exchange,* 235 A.3d 1106, 1116 (Pa. 2020).

V. Discussion

a. Coverage Provisions

***15** Plaintiff bears the initial burden to reasonably demonstrate that a claim falls within the policy's coverage provisions. *State Farm Cas. Co. v. Estate of Mehlman,* 589 F.3d 105, 111 (3d Cir. 2009) (applying Pennsylvania law). Then, provided that Plaintiff satisfies its initial burden, Defendants bear "the burden of proving the applicability of any exclusions or limitations on coverage." *Koppers Co. v. Aetna Cas. & Sur. Co.,* 98 F.3d 1440, 1446 (3d Cir. 1996) (applying Pennsylvania law). In order to prevail, Defendants must demonstrate that the language of the insurance contract regarding exclusions is "clear and unambiguous: otherwise, the provision will be construed in favor of the insured." *Fayette County Housing Authority v. Housing and Redevelopment Ins. Exchange,* 771 A.2d 11, 13 (Pa. Super. 2001).

First, this Court will address whether Plaintiff is entitled to coverage under the Business Income and Extra Expense provisions of the insurance contract for losses Plaintiff sustained in relation to the public health crises and the spread of the COVID-19 virus. With regard to Business Income and Extra Expense coverage, the insurance contract provides that:

> a. Business Income means: (1) [n]et income (Net Profit or Loss before Income taxes) that would have been earned or incurred ... and (2) [c]ontinuing normal operating expenses incurred, including payroll, subject to 90 day limitation if indicated on the Declaration page.

> b. [the insurer] will pay for the actual loss of Business Income you [the insured] sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

Plaintiff's Complaint, at 58, Exhibit B.

* * * * *

> a. Extra Expense means reasonable and necessary expenses you [the insured] incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss.
>
> b. [the insurer] will pay Extra Expense (other than to repair or replace property) to: (1) [a]void or minimize the "suspension" of business and to continue "operations" at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement premises or temporary locations; or (2) [m]inimize the "suspension" of business if you cannot continue "operations."
>
> c. [the insurer] will also pay any Extra Expense (including Expediting Expenses) to repair or replace property, but only to the extent it reduces the amount of loss that otherwise would have been payable under [the above Business Income provision].

Id. at 59, Exhibit B.

The insurance contract defines "suspension" as the "partial or complete cessation of your [the insured's] business activities; or ... that a part or all of the described premises is rendered untenantable," and "operations" means "the type of your [the insured's] business activities occurring at the described premises and tenantability of the described premises." *Id.* at 53-55, Exhibit B. The insurance contract defines "period of restoration" as:

> the period of time that: [b]egins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and ... [e]nds on the earlier of: (1) [t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) [t]he date when business is resumed at a new permanent location.

***16** *Id.* at 53, Exhibit B. Additionally, "Covered Cause of Loss" is defined as "RISK OF DIRECT PHYSICAL LOSS unless the loss is: a. Excluded in Section B. Exclusions; b. Limited in paragraph A.4 Limitations; or c. Limited or Excluded by other provision of this Policy." *Id.* at 37, Exhibit B.

In order to state a reasonable claim for coverage under the Business Income and Extra Expense provisions of the insurance contract, Plaintiff must show that it suffered "direct physical loss of or damage to" its property. The interpretation of the phrase "direct physical loss of or damage to property" is the key point of the parties' dispute.[7] Defendants contend that "direct physical loss of or damage to property" requires some physical altercation of or demonstrable harm to Plaintiff's property. Plaintiff contends that the "direct physical loss of ... property" is not limited to physical altercation of or damage to Plaintiff's property but includes the loss of use of Plaintiff's property. Plaintiff further asserts that, because its interpretation is reasonable, this Court must find in Plaintiff's favor.

[7] The parties do not dispute whether Plaintiff's business operations were at least partially suspended or interfered with due to COVID-19 and/or the government orders. The parties mainly contend whether Plaintiff's loss of use of its property entitles Plaintiff to coverage. The dispositive question with regard to whether Plaintiff is entitled to coverage for Business Income and Extra Expense is whether Plaintiff suffered a "direct physical loss of or damage to" Plaintiff's property. To the extent the parties disagree as to the meaning of the "period of restoration," and the potential impact of this phrase on the meaning of "direct physical loss of or damage to" Plaintiff's property, this Court addresses this issue in the body of this memorandum, after this Court's discussion

of the phrase "direct physical loss of or damage to property."

The insurance contract does not define the phrase "direct physical loss of or damage to property." As previously noted, Pennsylvania courts construe words of common usage in their "natural, plain, and ordinary sense ... and [Pennsylvania courts] may inform [their] understanding of these terms by considering their dictionary definitions." *Madison Construction Company,* 735 A.2d at 108. Four words in particular are germane to the determination of this threshold issue: "direct," "physical," "loss," and "damage." "Direct" is defined as "proceeding from one point to another in time or space without deviation or interruption ... [and/or] characterized by close logical, causal, or consequential relationship ...."[8] "Physical" is defined as "of or relating to natural science ... having a material existence ... [and/or] perceptible especially through the senses and subject to the laws of nature ...."[9] "Loss" is defined as "DESTRUCTION, RUIN ... [and/or] the act of losing possession [and/or] DEPRIVATION ..."[10] "Damage" is defined as "loss or harm resulting from injury to person, property, or reputation ...."[11]

8 Direct, Merriam-Webster, https://www.merriam-webster.coin/dictionary/direct.

9 Physical, Merriam-Webster, https://wwvv.merriam-webster.com/dictionary/physical.

10 Loss, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss.

11 Damage, Merriam Webster, https://www.merriam-webster.com/dictionary/damage.

***17** Before analyzing the definitions of each of the above terms to determine whether Plaintiff's interpretation is reasonable, it is important to note that the terms, in addition to their ordinary, dictionary definitions, must be considered in the context of the insurance contract and the specific facts of this case. *See Madison Construction Company,* 735 A.2d at 106 (clarifying that issues of contract interpretation are not resolved in a vacuum). While some courts have interpreted "direct physical loss of or damage to property" as requiring some form of physical altercation and/or harm to property in order for the insured to be entitled to coverage, this Court reasonably determined that any such interpretation improperly conflates "direct physical loss of" with "direct physical ... damage to" and ignores the fact that these two phrases are separated in the contract by the disjunctive "or."[12] It is axiomatic that courts must "not treat the words in the [contract] as mere surplusage ... [and] if at all possible, [this Court must] construe the [contract] in a manner that gives effect to all of the [contract's] language." *Indalex Inc. v. National Union Fire Ins. Co. Pittsburgh, PA,* 83 A.3d 418, 420-21 (Pa. Super. 2013). Based upon this vital principle of contract interpretation, this Court concluded that, due to the presence of the disjunctive "or," whatever "direct physical loss of" means, it must mean something different than "direct physical ... damage to."

12 *See Fayette County Housing Authority v. Housing and Redevelopment Ins. Exchange,* 771 A.2d 11, 15 (Pa. Super. 2001) (explaining that merely accepting the non-binding decisions of other courts "by the purely mechanical process of searching the nations courts for conflicting decisions" amounts to an abdication of this Court's judicial role).

In order to determine what the phrase "direct physical loss of ... property" reasonably means, this Court looked to the ordinary, dictionary definitions of the terms "direct," "physical," "loss," and "damage." This Court began its analysis with the terms "damage" and "loss," as these terms are the crux of the disputed language. As noted above, "damage" is defined as "loss or harm resulting from injury to person, property, or reputation ...,"[13] and "loss" is defined as "DESTRUCTION, RUIN ... [and/or] the act of losing possession [and/or] DEPRIVATION ..."[14]

13 Damage, Merriam Webster, https://www.merriam-webster.com/dictionary/damage.

14 Loss, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss.

Based upon the above-provided definitions, it is clear that "damage" and "loss," in certain contexts, tend to overlap. This is evident because the definition of "damage" includes the term "loss," and at least one definition of "loss" includes the terms "destruction" and "ruin," both of which indicate some form of damage. However, as noted above, in the context of this insurance contract, the concepts of "loss" and "damage" are separated by the disjunctive "or," and, therefore, the terms must mean something different from each other. Accordingly, in this instance, the most reasonable definition of "loss" is one that focuses on the act of losing possession and/or deprivation of property instead of one that encompasses various forms of damage to property, i.e., destruction and ruin. Applying this

definition gives the term "loss" meaning that is different from the term "damage." Specifically, whereas the meaning of the term "damage" encompasses all forms of harm to Plaintiff's property (complete or partial), this Court concluded that the meaning of the term "loss" reasonably encompasses the act of losing possession [and/or] deprivation, which includes the loss of use of property absent any harm to property.

In reaching its conclusion, this Court also considered the meaning and impact of the terms "direct" and "physical." Ultimately, this Court determined that the ordinary, dictionary definitions of the terms "direct" and "physical" are consistent with the above interpretation of the term "loss." As noted previously, "direct" is defined as "proceeding from one point to another in time or space without deviation or interruption ... [and/or] characterized by close logical, causal, or consequential relationship ...," [15] and "physical" is defined as "of or relating to natural science ... having a material existence ... [and/or] perceptible especially through the senses and subject to the laws of nature ...." [16] Based upon these definitions it is certainly reasonable to conclude that Plaintiff could suffer "direct" and "physical" loss of use of its property absent any harm to property.

15 Direct, Merriam-Webster, https://www.merriam-webster.com/dictionary/direct.

16 Physical, Merriam-Webster, https://www.merriam-webster.com/dictionary/physical.

***18** Here, Plaintiff's loss of use of its property was both "direct" and "physical." The spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which Plaintiff materially utilized its property and physical space. *See* February 22, 2021 Court Order of the United States District Court, N.D. Illinois, Eastern Division case *In re: Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation,* Civil Case No. 1:20-CV-05965 at 21 (stating that government shutdown orders and COVID-19 *directly* impacted the way businesses used *physical* space) (emphasis added). Indeed, the spread of COVID-19 and social distancing measures (with or without the Governor's orders) caused Plaintiff, and many other businesses, to *physically* limit the use of property and the number of people that could inhabit *physical* buildings at any given time. Thus, the spread of COVID-19 did not, as Defendant's contend, merely impose economic limitations. Any economic losses were secondary to the businesses' *physical* losses.

While Defendants are of course correct to point out that the terms "direct" and "physical" modify the terms "loss" and "damage," this does not somehow necessarily mean that the entire phrase "direct physical loss of or damage to property" requires actual harm to Plaintiff's property in every instance. Any argument that the terms "direct" and "physical," when combined, presuppose that any request for coverage must stem from some actual impact and harm to Plaintiff's property suffers from the same flaw noted in this Court's above discussion regarding the difference between the terms "loss" and "damage:" such interpretations fail to give effect to all of the insurance contract's terms and, again, render the phrase "direct physical loss of" duplicative of the phrase "direct physical ... damage to."

Defendants also contend that the insurance contract's definition for "period of restoration" suggests that the contract expressly contemplates and necessitates the existence of actual tangible damage in order for Plaintiff's to be entitled to Business Income and Extra Expense coverage. The insurance contract states that the insurer "will pay for the actual loss of Business Income [the insured] sustain[s] due to the necessary "suspension" of ... "operations" during the "period of restoration." Plaintiff's Complaint at 58, Exhibit B. The "period of restoration" begins at the time the direct physical loss of or damage to property occurs and ends on the date when the premises "should be repaired, rebuilt, or replaced with reasonable speed and similar quality ... or ... when the business is resumed at a new location." *Id.* at 53, Exhibit B. Specifically, Defendants argue that, without actual tangible damage, there is no period of restoration because there is no need for the property to be repaired, rebuilt, or replaced, and Plaintiff has no plans to resume the business at a new location.

Although this Court agrees with Defendants on the general principle that the insurance contract's provisions must be read as a whole so that all of its parts fit together, this Court is not persuaded that the definition for "period of restoration" is inherently inconsistent with an interpretation of "direct physical loss of ... property" that encompasses Plaintiff's loss of use of its property in the absence of damage. Indeed, the threat of COVID-19 has necessitated many physical changes to business properties across the Commonwealth. Such changes include, but are not limited to, the installation of partitions, additional handwashing/sanitization stations, and the installations or renovation of ventilation systems. These changes would undoubtably constitute "repairs" or "rebuilding" of property. *See* February

22, 2021 Court Order of the United States District Court, N.D. Illinois, Eastern Division case *In re: Society Insurance Co. COVID-19 Business Interruption Protection Insurance Litigation,* Civil Case No. 1:20-CV-05965 at 23 (stating that the installation of partitions and particular ventilations systems constitute "repairs" consistent with the period of restoration). Additionally, in order to "replace" or "rebuild" unused space due to social distancing protocols, businesses might choose to buildout new spaces, move to larger spaces, or rearrange existing spaces in order to increase the amount of business they can safely handle during these difficult times.

***19** Whether or not Plaintiff in the instant matter actually undertook such changes, or resumed its business at a new location, is of no moment. The "period of restoration" does not require repairs, rebuilding, replacement, or relocation of Plaintiff's property in order for Plaintiff to be entitled to coverage. The "period of restoration" merely imposes a time limit on available coverage, which ends whenever such measures, if undertaken, would have been completed with reasonable speed and similar quality. To put this another way, the "period of restoration" ends when Plaintiff's business is once again operating at normal capacity, or reasonably could be operating at normal capacity. The "period of restoration" does not somehow redefine or place further substantive limits on types of available coverage. Defendants cannot avoid providing coverage that is otherwise available simply because the end point with regard to the "period of restoration" may be, at times, slightly more difficult to pinpoint in the context of the COVID-19 pandemic.

As this Court determined that it is, at the very least, reasonable to interpret the phrase "direct physical loss of ... property" to encompass the loss of use of Plaintiff's property due to the spread of COVID-19 absent any actual damage to property, Plaintiff reasonably established a right to coverage under the Business Income and Extra Expense provisions of the insurance contract. [17]

17 This Court is aware that the insurance contract provides that any "direct physical loss of or damage to property" must be caused by a Covered Cause of Loss. However, Covered Cause of Loss is defined as "RISK OF DIRECT PHYSICAL LOSS unless the loss is: a. Excluded in Section B. Exclusions; b. Limited in paragraph A.4 Limitations; or c. Limited or Excluded by other provision of this Policy." *Id.* at 37, Exhibit B. Admittedly, this Court was somewhat perplexed by this definition. One would think that in defining Covered Causes of Loss the contract would state, either specifically or more generally, covered causes of loss, i.e. fire, tornado, hurricane, lightening, etc. Here, the contract's language instead turns back on itself and states that "direct physical loss of or damage to property" must be caused by "RISK OF DIRECT PHYSICAL LOSS unless the loss is ... Excluded ...." Given that this insurance contract is an "All Risk" insurance policy that is meant to cover any losses, damages, and expenses to the insured's premises unless specifically excluded, this Court determined it is reasonable to interpret Covered Cause of Loss in a manner that does not further limit the scope of coverage beyond any instance that amounts to a "direct physical loss of or damage to property," which is not otherwise excluded. Accordingly, this Court determined that as long as the spread of COVID-19 caused "direct physical loss of or damage to property," and does not fall within the ambit of one of the contract's exclusions, it is reasonable to interpret the contract as entitling Plaintiff to coverage. This same analysis regarding the term Covered Cause of Loss applies equally in the context of the contract's provision regarding Civil Authority coverage. Thus, this Court need not address Covered Cause of Loss again separately.

Second, this Court will address whether Plaintiff is entitled to coverage under the Civil Authority provision of the insurance contract for losses Plaintiff sustained in relation to the Governor's orders, which were issued to help mitigate the spread of the COVID-19 virus. With regard to Civil Authority coverage, the insurance contract provides that:

> 1. When the Declarations show that [the insured has] coverage for Business Income and Extra Expense, [the insured] may extend that insurance to apply to the actual loss of Business Income [the insured] sustain[s] and reasonable and necessary Extra Expense [the insured] incur[s] caused by an action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property

> at locations, other than described premises, caused by or resulting from a Covered Cause of Loss.

***20** Plaintiff's Complaint at 84, Exhibit B (emphasis added).

Thus, in order to state a reasonable claim of coverage under the Civil Authority provision of the insurance contract, Plaintiff must reasonably demonstrate both of the following: [1] there was "direct physical loss of or damage to property" other than Plaintiff's property; and [2] the "direct physical loss of or damage to property" other than Plaintiff's property caused civil authorities to take action(s) that prohibited access to Plaintiff's property.

Defendants contend that Plaintiff is not entitled to coverage under the Civil Authority provision of the contract because the Governor's orders did not completely prohibit Plaintiff from accessing its property. According to Defendants, although the Governor's orders closed Plaintiff's property to the majority of the general public, Plaintiff is nonetheless precluded from coverage under the Civil Authority provision of the insurance contract because Plaintiff and Plaintiff's employees were still able to access Plaintiff's property in order to conduct emergency procedures. Defendants also argue, just as they did with regard to the Business Income and Extra Expense coverage provisions, that any actions taken by civil authorities in response to COVID-19 were not caused by "direct physical loss of or damage to" property at any location. In contrast, Plaintiff contends that, because the Governor's orders prohibited Plaintiff from operating its business except in cases of emergency, and because the Governor's orders directed citizens of the Commonwealth to stay at home, the Governor's orders effectively prohibited meaningful access to Plaintiff's property. Additionally, Plaintiff argues that COVID-19 caused "direct physical loss of or damage to" property across the Commonwealth just as it did with regard to Plaintiff's property.

As to whether the spread of the COVID-19 virus caused "direct physical loss of or damage to" property, the same analysis that this Court applied with regard to Plaintiff's property also applies to other property as well. Even absent any damage to property, the spread of COVID-19 has resulted in a serious public health crisis, which has directly and physically caused the loss of use of property all across the Commonwealth. Again, this is evident because COVID-19 and the related social distancing measures (with and without government orders) directly forced businesses everywhere to physically limit the use of property and the number of people that could inhabit physical buildings at any given time in a safe and responsible manner. This Court's conclusion that other property was impacted by COVID-19 is supported by the Supreme Court of Pennsylvania. In *Friends of Danny DeVito v. Wolf,* 658 Pa. 165, 227 A.3d 872, 890 (2020), our Supreme Court clarified that the COVID-19 virus qualifies as a natural disaster, and, given the nature of the manner in which COVID-19 spreads, Governor Wolf "had the authority under the Emergency Code to declare the entirety of the Commonwealth a disaster area." [18]

18 In its opinion upholding the Governor Wolf's use of the Emergency Code to shutdown businesses throughout the Commonwealth, the Supreme Court of Pennsylvania explained that, as of April 8, 2020, confirmed cases of COVID-19 had been reported in every single county in the Commonwealth, and "*any location where two or more people can congregate is within the disaster area*." *Friends of Danny DeVito v. Wolf* 658 Pa. 165, 227 A.3d 872, 889-90 (2020) (emphasis added). The Supreme Court of Pennsylvania reached this conclusion because "[t]he virus spreads *primarily through person-to-person contact,* has an incubation period of up to fourteen days, one in four carriers are asymptomatic, and the virus can live on surfaces for up to four days." *Id.* at 889 (emphasis added).

***21** With regard to whether "an action of civil authority ... prohibit[ed] access" to Plaintiff's property, this Court determined that the phrase "prohibits access" may reasonably be interpreted to encompass the instant situation. The term "prohibit" is defined as "to forbid by authority [and/or] to prevent from doing something ...." [19] Here, the Governor's emergency orders did exactly that. The Governor's orders directed individuals to stay home and required businesses to essentially close their doors absent emergencies and/or the need to conduct life sustaining operations. Although Plaintiff's business (a dental practice) was technically permitted to remain open to conduct certain limited emergency procedures, this does not change the fact that an action of civil authority effectively prevented, or forbade by authority, citizens of the Commonwealth from accessing Plaintiff's business in any meaningful way for normal, non-emergency procedures; procedures that likely yeild a significant portion of Plaintiff's business income.

19 Prohibit, Merriam-Webster, https://www.merriam-webster.com/dictionary/prohibit.

This Court is not persuaded by Defendant's argument that, in order to be entitled to Civil Authority coverage, the action of civil authority must be a complete and total prohibition of all access to Plaintiff's property by any person for any reason. If this Court were to accept Defendant's cramped interpretation of the phrase "prohibits access," it would result in businesses being precluded from coverage in nearly every instance where an action of civil authority effectively closes the business to the vast majority of the general public, but does not necessarily preclude employees, or certain other individuals, from entering the premises to clean, maintain the building, obtain important documents, or to perform other similar functions, which, while important, remain secondary to the activities that actually generate business income.

Once again this Court notes the importance of reading the insurance contract's provisions as a whole so that all of its parts fit together. In so doing, this Court recognizes that the insurance contract provisions at issue are generally designed to provide business owners with coverage for lost busines *income* in the event that their business' operations are suspended. Accordingly, this Court's primary focus when interpreting the phrase "prohibits access," at least in the context of this insurance contract, is the extent to which the action of civil authority prevented the insured from accessing its premises in a manner that would normally produce actual and regular business income. Given this understanding of the insurance contract, the fact that some employees, and even some limited number of patients, were still permitted to go to Plaintiff's property for emergency procedures does not necessarily mean that Plaintiff is altogether precluded from coverage under the Civil Authority provision. The contract merely requires that "an action of civil authority ... prohibits access to" Plaintiff's property. It does not clearly and unambiguously state that any such prohibition must completely and totally bar *all* persons from *any* form of access to Plaintiff's property whatsoever.

As this Court determined that Plaintiff provided a reasonable interpretation that: [1] there was "direct physical loss of or damage to property" other than Plaintiff's property; and [2] the "direct physical loss of or damage to property" other than Plaintiff's property caused civil authorities to take action(s) that prohibited access to Plaintiff's property, this Court concluded that Plaintiff established a right to coverage under the Civil Authority provision of the contract.

b. Exclusions

Having determined that Plaintiff provided reasonable interpretations demonstrating that there is coverage under the Business Income, Extra Expense, and Civil Authority provisions of the insurance contract, this Court turns to the question of whether Defendants demonstrated "the applicability of any exclusions or limitations on coverage." *Koppers Co.,* 98 F.3d at 1446 (applying Pennsylvania law). As discussed previously, in order to prevail, Defendants must show that the language of the insurance contract regarding exclusions is "clear and unambiguous: otherwise, the provision will be construed in favor of the insured." *Fayette County Housing Authority,* 771 A.2d at 13.

***22** This Court starts by addressing the exclusion for Contamination. With regard to this exclusion, the insurance contract provides that "[the insurer] will not pay for loss or damage caused directly or indirectly by any of the following ... [c]ontamination by other than "pollutants." Plaintiff's Complaint at 41, Exhibit B. Because the insurance contract does not define the term contamination, this Court looks to the word's natural, plain, and ordinary meaning, and informs its understanding of this term by considering its dictionary definition. *Madison Construction Company,* 735 A.2d at 108.

Merriam-Webster defines contamination as "the process of contaminating [and/or] the state of being contaminated." [20] Additionally, in *Raybestos-Manhattan, Inc. v. Industrial Risk Insurers,* 289 Pa.Super. 479, 433 A.2d 906, 907 (1981), the Superior Court of Pennsylvania clarified that:

> Contamination connotes a condition of impurity resulting from mixture or contact with a foreign substance ... [and] the word contaminate is defined as ... to render unfit for use by the introduction of unwholesome or undesirable elements.... Contaminate implies an action by something external to an object which by entering into or coming in contact with the object destroys its purity.

20 Contamination, Merriam-Webster, https://www.merriam-webster.com/dictionary/contamination.

This Court recognizes that the above-described common and ordinary definitions of the terms contamination and contaminate are considerably broad. However, in determining whether the contamination exclusion applies clearly and unambiguously to the loss of use of property due to social distancing measures designed to prevent the spread of COVID-19, this Court acknowledges that the question is not whether the definition of contamination is so broad that virtually anything could come within its ambit. *Madison Construction Co.,* 735 A.2d at 607. Instead, this Court is "guided by the principle that ambiguity (or the lack thereof) is to be determined by reference to a particular set of facts." *Id.*

Based upon the above dictionary definitions, the contamination exclusion only applies, in the broadest sense, when something external comes into contact with an object, i.e., property, and destroys the object's purity. Accordingly, if the specific cause of the loss of use of property was COVID-19 contacting objects, and destroying the objects' purity, then the insurance contract's contamination exclusion might prevent coverage. However, based upon the particular facts of this case, and considering the primary means by which COVID-19 spreads, the cause for the loss of use of property was *not* the contamination of property. Rather, the cause of the loss of use of property was the risk of person-to-person transmission of COVID-19, which necessitated social distancing measures and fundamentally changed the way businesses utilized physical space (property).

The Supreme Court's recent decision in *Friends of Danny DeVito* supports the above conclusion. In rejecting the argument that actual contamination of specific property was necessary in order to justify Governor Wolf's orders restricting business operations throughout the Commonwealth, the Supreme Court of Pennsylvania elucidated that arguments regarding the dangers of COVID-19 contaminating property misunderstand the primary means by which COVID-19 spreads. *Id.* at 892. Specifically, the Supreme Court of Pennsylvania clarified that "COVID-19 does not spread because the virus is *at* a particular location ... [i]nstead it spreads because of person-to-person contact, as it has an incubation period of up to fourteen days and that one in four carriers are asymptomatic. *Id.* (emphasis in original).

***23** Although it is contested whether COVID-19 can live on the surfaces of property for some period of time, and while this might be one way by which individuals contract COVID-19, it is not the primary means nor is it the only means by which COVID-19 spreads. *Id.* Indeed, with or without actual COVID-19 contamination at any given property in the Commonwealth, businesses suffered the loss of use of property due to the risk of person-to-person COVID-19 transmission. Thus, the risk of person-to-person transmission of COVID-19, and the social distancing measures necessary to mitigate the spread of the COVID-19, together constitute a cause that is both *separate and distinct* from any possible or actual contamination of property.

It is important to note that, although the contamination exclusion might, at times, cover viruses when viruses actually contaminate property, the contamination exclusion does *not* altogether exclude loss of use of property caused by viruses in any manner whatsoever. If Defendants wanted to exclude coverage for any loss caused by viruses in any manner whatsoever, Defendants could have easily included such a provision clearly and unambiguously in the contract. However, Defendants did not include a virus exclusion.

In sum, because it is reasonable to conclude that the loss of use of property due to the risk of person-to person transmission of COVID-19 is not clearly and unambiguously encompassed by the contamination exclusion, Defendants failed to show that the contamination exclusion prevents coverage in this instance. [21]

21 While this Court's above analysis is not dependent upon whether COVID-19 was in fact at Plaintiff's premises, Defendants' Cross Motions for Summary Judgment acknowledge that "Plaintiff neither alleged nor produced evidence that the virus was present at its dental offices ...." Valley Forge Insurance Company's Cross Motion for Summary Judgment at 10; *see also* CNA's Cross Motion for Summary Judgment at 10. This fact provides further support that the contamination exclusion does not prevent coverage in this instance. Defendants cannot, at the same time, contend that the virus was not present at Plaintiff's property and that the exclusion contamination exclusion applies.

Next, this Court will address the exclusion for Fungi, Wet Rot, Dry Rot and Microbes. With regard to this exclusion, the insurance contract provides that the insurer will not

pay for loss or damage caused directly or indirectly by the "[p]resence, growth, proliferation, spread or any activity of fungi, wet or dry rot, or microbes." Plaintiff's Complaint at 118, Exhibit B. The insurance contract provides the following definition for the term "Microbes:"

> "Microbe(s)" means any non-fungal micro-organism or non-fungal, colony-form organism that causes infection or disease. "Microbes" includes any spores, mycotoxins, odors, or any other substances, products, or by products produced by, or arising out of the current or past presence of "microbes."

Id. at 19, Exhibit B.

Without any elaboration and explanation, Defendants contend that COVID-19 is excluded because viruses fall within the insurance contract's definition of the term "Microbe." This Court is, however, not persuaded that Defendants' interpretation of the term "Microbe" is clear and unambiguous.

Naturally, upon its initial review, the contract's use of the word "Microbe" caused this Court to pause and generally wonder what is a "Microbe," and more specifically with regard to this case, does a virus qualify as a "Microbe?" Again, this begs the question: If Defendants wanted to exclude viruses, why not simply use the word virus explicitly in the insurance contract? Regardless, even assuming that a virus could technically be considered a "Microbe" in the most general sense of the word, this Court recognizes that, in this instance, it is of course not the general sense of the term "Microbe" that is controlling. Rather, because the insurance contract provides a specific definition of the term "Microbe," it is this definition that necessarily dictates what a "Microbe" is, and whether viruses fall within the ambit of the contract's "Microbe" exclusion.

***24** Upon reading the insurance contract's definition of the term "Microbe," this Court determined that, in order to fall within the "Microbe" exclusion, COVID-19 must qualify as a "micro-organism" and/or an "organism." Because the contract does not define the terms "microorganism" or "organism," this Court looked to the words' natural, plain, and ordinary meaning, and informed its understanding of these terms by considering their dictionary definitions. *Madison Construction Company,* 735 A.2d at 108.

Merriam-Webster defines "microorganism" as "an organism (such as a bacterium or protozoan) of microscopic or ultramicroscopic size."[22] Merriam-Webster defines "organism" in relevant part as "an individual constituted to carry on the activities of life by means of parts or organs more or less separate in function but mutually dependent [and/or] *a living being.*"[23]

22 Microorganism, Merriam-Webster, https://www.merriam-webster.com/dictionary/microorganism.

23 Organism, Merriam-Webster, https://www.merriam-webster.com/dictionary/organism (emphasis added).

In contrast, Merriam-Webster defines a virus as "any large group of submicroscopic infectious agents that are usually regarded as *nonliving* extremely complex molecules ... that are capable of growth and multiplication only in living cells, and that cause various important diseases in humans, animals, and plants."[24] In fact, "outside a host viruses are dormant ... [they] have none of the traditional trappings of life [and their] zombielike existence ... makes them easy to catch and hard to kill."[25]

24 Virus, Merriam-Webster, https://www.merriam-webster.com/dictionary/virus (emphasis added).

25 Sarah Kaplan et al., *The coronavirus isn't alive. That's why it's so hard to kill.*, The Washington Post, March 23, 2020 https://www.washingtonnost.com/health/2020/03/23/coronavirus-isnt-alive-thats-why-its-so-hard-kill/.

Based upon the ordinary, dictionary definitions of the terms "microorganism," "organism," and "virus," this Court concluded that: [1] the term "Microbe" generally includes things that carry on the activities of life, i.e., things that are alive; and [2] a virus is generally regarded as something that is non-living, and is capable of growth and multiplication only when it attaches to, or gets inside of, other living host cells. Accordingly, given the insurance contract's specific definition of the term "Microbe," it is reasonable to conclude that the "Microbe" exclusion does not actually encompass

viruses, as viruses are generally not considered living things. Consequently, this Court determined that Defendants failed to demonstrate that the exclusion for Fungi, Wet Rot, Dry Rot and Microbes clearly and unambiguously prevents coverage.

In reaching these conclusions, this Court of law does not masquerade as an expert in the complex intricacies of science, nor does it presume to wholly realize the subtle considerations by which trained scientists define and classify things in the natural world. This Court acknowledges that, in certain contexts, the terms "microorganism" and/or "organism" might refer to things that are not traditionally considered living entities.[26] This Court also understands that there are some in the scientific community who might classify viruses as a kind of semi-living, zombie-like thing.[27] However, this Court need not wade into the mire of such sophisticated considerations. The question before this Court on summary judgment is not so complicated. The question is simply whether the insurance contract provisions at issue are subject to more than one reasonable interpretation. If the contract's terms are subject to more than one reasonable interpretation, they are ambiguous, and Pennsylvania law directs this Court to find in favor of the insured. Again, this Court may inform its understanding of the contract's terms using ordinary, dictionary definitions. *See Madison Construction Company,* 735 A.2d at 108. Based upon the above definitions, this Court determined that it is reasonable to interpret the "Microbe" exclusion as applying only to *living* microscopic things such as bacterium, and *not non-living* viruses.[28]

26 Merriam-Webster also defines "organism" in the most general sense as "a complex structure of interdependent and subordinate elements whose relations and properties are largely determined by their function in the whole." Organism, Merriam-Webster, https://www.merriam-webster.com/dictionary/organism. Merriam-Webster elaborates on this particular use of the word organism by providing the following quotation from Joseph Rossi: "the nation is not merely the sum of individual citizens at any given time, but it is a living organism, a mystical body ... of which the individual is an ephemeral part." *Id.* Based upon this quotation, and the context in which the terms "microorganism" and "organism" appear in the insurance contract, this Court concluded that more scientific definition is most relevant to this Court's discussion.

27 While there is some argument over whether viruses are living organisms, "[m]ost virologists consider them nonliving, as they do not meet all the criteria of the generally accepted definition of life." *What are microorganisms?* Centre for Geobiology, University of Bergen, November 1, 2010 https://www.uib.no/en/geobio/56846/what-are-microorganisms.

28 Bacterium is defined to include to following:

> any of a domain (Bacteria) ... of chiefly round, spiral, or rod-shaped single-celled prokaryotic microorganisms that typically *live* in soil, water, organic matter, or the bodies of plants and animals, that make their own food especially from sunlight or are saprophytic or parasitic, are often motile by means of flagella, reproduce especially by binary fission, and include many important pathogens.

Bacterium, Merriam-Webster, https://www.merriam-webster.com/dictionary/bacterium (emphasis added).

***25** Next, this Court will address the exclusion for Consequential Loss. With regard to this exclusion, the insurance contract provides that the insurer will not pay for loss or damage caused directly or indirectly by "[d]elay, loss of use or loss of market." Plaintiff's Complaint at 41, Exhibit B. Defendants argue that even if Plaintiff had shown a basis for coverage under the insurance contract, this exclusion clearly and unambiguously excludes coverage.

The problem with this exclusion is not so much that it is unclear or ambiguous. Rather, the problem is that, based upon a plain reading of the Consequential Loss exclusion, this exclusion would vitiate Business Income, Extra Expense, and Civil Authority coverage in their entirety. *See* January 19, 2021 Court Order of the United States District Court, N.D. Ohio, Eastern Division case *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Company,* Civil Case No. 1:20-cv-01239-DAP (holding that "the Loss of Use exclusion *would* vitiate the Loss of Business Income coverage"). This evident because, even if this Court accepted Defendants' more limited interpretation of the scope of coverage and the phrase "direct physical loss of or damage to property" to only include coverage in instances where Plaintiff's property was physically altered or damaged, this exclusion would effectively eliminate coverage for any kind of loss and/or damage caused by any covered peril, which closes Plaintiff's business while it is being repaired. *Id.* In

other words, if this Court were to find the exclusion for Consequential Loss to be valid, this exclusion would make all Business Income, Extra Expense, and Civil Authority coverage illusory. *See Heller v. Pennsylvania League of Cities and Municipalities,* 613 Pa. 143, 32 A.3d 1213, 1228 (2011) (holding that where an exclusionary provision of an insurance contract operates to foreclose the majority of expected claims, such a provision is void as it renders coverage illusory). Because this Court must read the insurance contract in its entirety, and in a manner calculated to give the agreement its intended effect, this Court concludes that the exclusion for Consequential Loss does not prevent coverage.

Finally, this Court will address the exclusions for Acts or Decisions and Ordinance or Law. With regard to the exclusion for Acts or Decisions, the insurance contract provides that the insurer will not pay for loss or damage caused directly or indirectly by "Acts or Decisions, including the failure to act or decide, of any person, group, organization or governmental body." Plaintiff's Complaint at 42, Exhibit B. With regard to the exclusion for Ordinance or Law, the insurance contract provides that the insurer will not pay for loss or damage caused directly or indirectly by the following:

> (1) The enforcement of any ordinance or law:
>
> (a) Regulating the construction, use or repair of any property; or
>
> (b) Requiring the tearing down of any property, including the cost of removing debris.
>
> (2) This exclusion applies whether the loss results from:
>
> (a) An ordinance or law that is enforced even if the property has not been damaged; or
>
> (b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition or property, or removal of its debris, following a physical loss to that property.

Defendants argue that coverage is precluded by both of the above exclusions because Plaintiff's claim for "direct physical loss of or damage to property" is solely due to the Governor's orders. This, however, is not the case. In its complaint, Plaintiff states that its claim for coverage is based upon losses and expenses Plaintiff suffered in relation to both "*the COVID-19 pandemic* and the actions of the government in response thereto." Plaintiff's Complaint at 4 (emphasis added). As this Court explained earlier in this memorandum, COVID-19 and the related social distancing measures (with and without government orders) directly forced businesses everywhere to physically limit the use of property and the number of people that could inhabit physical buildings at any given time. The Governor's orders only came into consideration in the context of Plaintiff's claim for coverage under the Civil Authority provision of the contract. [29] Accordingly, Defendants failed to demonstrate that the exclusions for Acts or Decisions and Ordinance or Law preclude coverage.

29 Certainly, the exclusions for Acts or Decisions and Ordinance or Law could not have been intended to exclude coverage under the Civil Authority provision of the contract, as this would make any extended coverage for the actions of Civil Authority illusory. *See Heller v. Pennsylvania League of Cities and Municipalities,* 613 Pa. 143, 32 A.3d 1213, 1228 (2011) (holding that where an exclusionary provision of an insurance contract operates to foreclose expected claims, such a provision is void as it renders coverage illusory).

VI. Conclusion

***26** In Pennsylvania, "where there is doubt or uncertainty about the meaning of ambiguous language used in a policy of insurance, the policy must be construed in favor of the insured in order to not defeat the protection which [the insured] reasonably expected from the policy [the insured] purchased." *Raybestos-Manhattan, Inc.,* 433 A.2d at 908. This Court determined that Plaintiff's interpretations of the Business Income, Extra Expense, and Civil Authority provisions of the insurance contract were, at the very least, reasonable. Additionally, this Court concluded that Defendants failed to demonstrate that any of the insurance contract's exclusions clearly and unambiguously prevent coverage. Accordingly, because there are no genuine issues of material fact, Plaintiff's Motion for Summary Judgment is GRANTED, and Defendants' Cross Motions for Summary Judgement are DENIED.

By the Court:

Christine Ward, J.
Christine Ward, J.

Dated: 3/22/21

DISSENTING OPINION BY STABILE, J.:

I respectfully dissent. In affirming the trial court, the Majority endorses a strained construct of the Policy [1] that parses individual words under dictionary meanings to arrive at a disjointed and unreasonable interpretation of the operative phrase at issue - "direct physical loss or damage to property". In doing so, the Majority violates rules relating to contract interpretation that do not allow individual terms and provisions to be read in isolation. Individual terms must be considered under the policy as a whole. The Majority decision now places Pennsylvania as an outlier from the near unanimous conclusions reached by all state and federal courts to have considered the meaning of substantially similar language. I would accordingly reverse the trial court and grant summary judgment in favor of the Appellants, CNA and Valley Forge Insurance Company, and against the Appellee, Timothy A. Ungarean.

1 Reference to the "Policy" herein is to the "Businessowners Special Property Coverage Form" and the "Business Expense and Extra Expense" endorsement purchased by Ungarean for his business. The Policy appears in the certified record as Exhibit "B" to Ungarean's June 5, 2020 complaint and Exhibit "A" to Appellants' July 30, 2020 answer and new matter.

As the Majority explains, the operative facts are straightforward and not substantially in dispute. Appellants sold Ungarean an insurance Policy covering, among other things, "direct physical loss of or damage to Covered Property"—that Property being buildings in Aliquippa, Pennsylvania, and Pittsburgh, Pennsylvania, in which Ungarean operates his dentistry practice. Policy, Businessowners Special Property Coverage Form, at ¶ A. On March 6, 2020, in response to the spread of the Covid-19 virus, Governor Tom Wolf issued a Proclamation of Disaster Emergency. Subsequent executive orders followed, resulting in the temporary closure of many non-essential businesses. Ungarean's dental practice was designated a life-sustaining business, thus permitting him to continue to use his business premises for emergency procedures only. Nonetheless, like so many similarly situated parties, Ungarean suffered a significant disruption of his business activity during the Covid-19 pandemic. And like many similarly situated parties, Ungarean believed his economic losses due to the loss of use of his business premises were covered under his commercial property insurance. Ungarean filed a claim under the Policy seeking coverage for the economic losses he sustained from the inability to provide non-emergency dental care on his business premises.

Appellants, like many other insurers who have issued polices with substantially similar terms, denied the claim because Ungarean's commercial property did not suffer any physical damage. This issue has made its way through many of our nation's federal and state courts, but it is an issue of first impression in Pennsylvania. Contrary to the Majority, I would reach the same result as the almost unanimous majority of jurisdictions to have addressed this issue: the Policy does not cover mere *loss of use* of commercial property unaccompanied by physical alteration or other condition present in the property that renders the property itself unusable or uninhabitable.

***27** The parties dispute whether the Policy covers Ungarean's claim and, if so, whether any of the Policy's exclusions applies. I conclude that no coverage exists and would reverse and remand for an order entering summary judgment [2] in favor of Appellants.

2 Summary judgment is appropriate where there is no genuine issue of fact as to the matter in controversy and the moving party is entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.2(1); ***Summers v. Certainteed Corp.***, 606 Pa. 294, 997 A.2d 1152, 1159 (2010). The appeal before us presents a question of law; our standard of review is *de novo* and our scope of review is plenary. ***Summers***, 997 A.2d at 1159-60.

An insured may invoke the Declaratory Judgments Act, 42 Pa.C.S.A. § 7531, *et seq.*, to determine whether an insurance contract covers an asserted claim. ***Genaeya Corp. v. Harco Nat'l Ins. Co.***, 991 A.2d 342, 346 (Pa. Super. 2010). Where the language of the policy is clear, this Court must give it effect. ***Indalex Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA***, 83 A.3d 418, 420 (Pa. Super. 2013), ***appeal denied***, 627 Pa. 759, 99 A.3d 926 (2014). "Also, we do not treat the words in the policy as mere surplusage and, if at all possible we construe the policy in a manner that gives effect to all of the policy's language." ***Id.*** at 421. We will construe any ambiguity in favor of the insured. ***Id.*** at 420-21. "Contract language is ambiguous

> if it is reasonably susceptible to more than one construction and meaning." ***Pennsylvania Nat'l Mut. Cas. Ins. Co. v. St. John***, 630 Pa. 1, 106 A.3d 1, 24 (2014). The insured bears the initial burden of establishing that the asserted claim is covered. ***Erie Ins. Grp. v. Catania***, 95 A.3d 320, 322–23 (Pa. Super. 2014). If the insured is successful, the insurer bears the burden of establishing the applicability of an exclusion. ***Id.***

Under Ungarean's Policy, CNA agreed to pay for "direct physical loss or damage to Covered Property at the premises ... caused by or resulting from a *Covered Cause of Loss*." Coverage Form, at A., p.1. (Emphasis added). Covered Property includes Buildings and Business Personal Property as defined in the Policy. ***Id.*** at A.1. "Covered Causes of Loss" are "Risks of Direct Physical Loss", unless the loss is excluded under section B, Exclusions, the loss is limited under paragraph A.4, Limitations, or otherwise excluded elsewhere under the Policy. ***Id.*** at A.3.

The additional coverage purchased by Ungarean in the form of a "Business Income and Extra Expense" endorsement, the text of which forms the dispositive issue in this appeal, provides in pertinent part:

> 1. **Business Income**
>
> b. We will pay for the actual loss of **Business Income** you sustain due to the necessary **"suspension"** of your "operations during the **"period of restoration."** The "suspension" must be caused by **direct physical loss of or damage to property** at the described premises. The loss or damage must be caused by or result from a **Covered Cause of Loss.** ....
>
> ***
>
> 2. **Extra Expense**
>
> a. means reasonable and necessary expenses you incur during the **"period of restoration"** that you would not have incurred if there had been no **direct physical loss of or damage to property** caused by or resulting from a **Covered Cause of Loss**.
>
> b. We will pay Extra Expense (other than the expense to repair or replace property) to:
>
> ***28** 1. Avoid or minimize the "suspension" of business and to continue "operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement premises or temporary locations; or
>
> 2. Minimize the suspension of business if you cannot continue operations.

CNA Policy, Business Income and Extra Expense Endorsement, at 1.b., 2a, 2b. (Emphasis added).

A "suspension" occurs under the Policy when the insured suffers the "partial or complete cessation of [...] business activities." Policy, Business Owners Special Property Coverage Form, ¶ G.29.

The Policy defines "period of restoration" in relevant part as a period of time that:

> a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and
>
> b. Ends on the earlier of:
>
> 1. The date **when the property at the described premises should be repaired, rebuilt, or replaced** with reasonable speed and similar quality; or
>
> 2. The date when business is resumed at a new, permanent location.

Id. at ¶ G.20. (Emphasis added).

When the Policy is read as a whole, as it must be, it is clear that a claim for lost business income and extra expenses only will be covered if the property sustains a tangible loss or damage that causes a suspension of business activities. If these conditions are satisfied, then coverage is provided, but only for the period of restoration during which the property has to be rebuilt, repaired, or replaced. When the term "direct physical loss or damage to property" is read within the context of the entire Policy, the conclusion is inescapable that coverage is not provided for purely economic loss. The Policy unambiguously ties coverage for insured business income and extra expense losses to occurrences where there is some tangible damage to or tangible loss of the property for coverage to apply—a "direct physical loss of or damage to property". As will be explained, this is the only reasonable interpretation of this policy provision. Construing the reference to "direct physical loss or damage to property" to pertain to purely economic loss without

property damage, as the Majority concludes, results only from a strained interpretation of the Policy and does so without giving full effect to all the Policy provisions.

Words of common usage in an insurance policy are to be construed in their natural, plain, and ordinary sense. ***Madison Const. v. Harleysville Mut. Ins.***, 557 Pa. 595, 735 A. 2d 100 (1999). Language in a policy is ambiguous if it is susceptible to more than one reasonable interpretation. ***Kurach v. Truck Ins. Exch.***, 235 A.3d 1106, 1116 (Pa. 2020). A word is not ambiguous, however, simply because it is undefined. ***Gemini Ins. Co. v. Meyer Jabara Hotels LLC***, 231 A.3d 839, 849 (Pa. Super. 2020). Instead, courts must read a policy as a whole and construe its meaning according to its plain language. ***Madison***, 735 A.2d at 108. Individual terms and provisions cannot be read in isolation; a policy must be considered as a whole. ***Pennsylvania Nat. Mut. Cas. Ins. Co.v. St. John***, 630 Pa. 1, 106 A.3d 1, 14 (2014). Courts cannot distort the meaning of language or resort to a strained contrivance in order to find an ambiguity. ***Madison***, 735 A.2d at 106 (**citing** ***Steuart v. McChesney,*** 498 Pa. 45, 444 A.2d 659, 663 (1982)).

***29** The trial court, construing the phrase "direct physical loss of or damage to ...", reasoned that the disjunctive "or" between "direct physical loss of" and "damage to" supports a reasonable reading of the Policy whereby a "direct physical loss" need not necessarily result from physical or structural damage:

> The spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which [Ungarean] materially used its property and physical space. Indeed, the spread of COVID-19 and social distancing measures (with or without the Governor's orders) caused [Ungarean], and many other businesses, to *physically* limit the use of property and the number of people that could inhabit *physical* buildings at any given time, if at all. Thus, the spread of Covid-19 did not, as [Appellants contend], merely impose economic limitations. Any economic losses were secondary to the businesses' *physical* losses.

Trial Court Opinion, 6/1/21, at 16-17 (emphasis in original; citation omitted). Regarding the "period of restoration" provisions, the trial court reasoned that they "merely impose[ ] a time limit on available coverage, which ends whenever any [repairs], if undertaken, would have been completed with reasonable speed and similar quality." ***Id.*** at 19. Because it merely imposes a time limit, the trial court found that the amount of insurance provision did not alter its interpretation of "physical loss or damage." ***Id.*** The Majority finds itself in full agreement with the trial court's reasoning and conclusions, and affirms the decision below based primarily on the trial court's opinion. Majority Opinion, at 2.

I disagree, and conclude that economic loss unaccompanied by a physical alteration to the property does not trigger coverage under this commercial property insurance policy—a result that is overwhelmingly and persuasively supported by decisions from across the country. In ***Delaware Valley Mgmt., LLC v. Continental Cas. Co.***, 572 F.Supp.3d 119 (E.D. Pa. 2021), for example, the plaintiff medical providers were prohibited to offer elective surgeries due to the Covid-19 pandemic. They alleged that their properties became contamination zones and that their ability to conduct business was significantly limited. ***Id.*** at 125. Plaintiffs argued, as Ungarean did here, that "physical loss of or damage to property" was reasonably susceptible of more than one meaning and therefore ambiguous. The Federal District Court disagreed:

> Here, not only was there no physical alteration to the Covered Properties, but there was also no loss of utility of the buildings. Indeed, Plaintiffs admit that they "could remain open, but only for essential surgeries, not elective." (Am. Compl. at ¶ 77.) And Plaintiffs' loss of their ability to perform elective surgeries does not render the building "uninhabitable." Rather, their ability to conduct business was limited, which resulted in purely economic losses.

Id. at 129. Likewise, damage to property exists where there is "actual structural damage" or where damage "unnoticeable to the naked eye render[s] the property entirely useless and uninhabitable." ***Id.*** at 130. The ***Delaware Valley*** Court noted that the amount of insurance was tied to the period of physical restoration, and that the period of restoration portion of the

policy made no sense unless the damage in question was physical damage. ***Id.*** at 130-31.

30** Similarly, the Third Circuit Court of Appeals, applying the law of New York and New Jersey, held that the presence of asbestos does not constitute "physical loss or damage" unless it is present in the air in quantities sufficient to render the building "uninhabitable and unusable." ***Port Authority of New York and New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 232, 236 (3d Cir. 2002); ***see also***, ***Round Guys Brewing Co. v. Cincinnati Ins. Co.*** 2021 WL 4306027 (E.D. Pa. September 22, 2021) (holding that a loss of business due to governmental orders, unaccompanied by physical property damage, does not trigger coverage).

Likewise in ***Spector Gadon Rosen Vinci P.C. v. Valley Forge Ins. Co.***, 2021 Phila. Ct. Com. Pl. LEXIS 16 (June 16, 2021), the trial court found that the plaintiff law firm's loss of use of its office space pursuant to Governor Wolf's orders did not trigger coverage under a policy covering direct physical loss of or damage to its commercial property. Applying ***Port Authority***, the trial court found that physical damage to the insured property is necessary, especially in light of language in the policy contemplating a period of restoration during which physical repairs take place. ***Id.*** at *10.

Throughout the country, courts considering similar policy language in similar circumstances have found no coverage. In ***Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.***, 22 F.4th 450 (5th Cir. 2022) the Court held that the plaintiff's inability to provide dine-in services was an economic loss unrelated to the insured's property:

> TBB has failed to allege any tangible alteration or deprivation of its property. Nothing physical or tangible happened to TBB's restaurants at all. In fact, TBB had ownership of, access to, and ability to use all physical parts of its restaurants at all times. And importantly, the prohibition on dine-in services did nothing to physically deprive TBB of any property at its restaurants.

Id. at 456; ***see also***, ***Santo's Italian Café LLC v. Acuity Ins. Co.***, 15 F.4th 398, 402 (6th Cir. 2021) (noting that direct physical loss and direct physical damage are the "North Star of this property insurance policy from start to finish"); ***Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.,*** 499 F. Supp.3d 288 (S.D. Miss. 2020) (holding that insurance against physical loss of or damage to property covers damage to the insured's building and personal property but not the operations). [3]

3 For representative federal cases holding that a physical alteration to the property is necessary to trigger coverage, ***See, e.g.***, ***10012 Holdings, Inc. v. Sentinel Ins.***, 21 F.4th 216 (2d Cir. 2021); ***Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.***, 20 F.4th 303 (7th Cir. 2021); ***Sandy Point Dental, P.C. v. Cincinnati Ins. Co.***, 20 F.4th 327 (7th Cir. 2021); ***Oral Surgeons, P.C. v. Cincinnati Ins. Co.***, 2 F.4th 1141 (8th Cir. 2021); ***Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.***, 15 F. 4th 885 (9th Cir. 2021); ***Goodwill Indus. of Cent. Okla. v. Philadelphia Indemnity Insurance Co.***, 21 F.4th 704 (10th Cir. 2021).
For representative state court cases, ***See, e.g.***, ***Inns by the Sea v. California Mut. Ins. Co.***, 71 Cal.App.5th 688, 286 Cal.Rptr.3d 576 (Cal. Ct. App. 2021); ***Indiana Repertory Theatre v. Cincinnati Cas. Co.***, 180 N.E.3d 403 (Ind. Ct. App. 2022); ***Wakonda Club v. Selective Ins. Co. of Am.***, 973 N.W.2d 545 (Iowa 2022); ***Verveine Co. v. Strathmore Ins. Co.***, 489 Mass. 534, 184 N.E.3d 1266 (2022); ***Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co.***, —— Mich.App. ——, —— N.W.2d ——, 2022 WL 301555 (Mich. Ct. App. Feb. 1, 2022); ***MAC Prop. Grp. v. Selective Fire and Cas. Ins. Co.***, 473 N.J.Super. 1, 278 A.3d 272 (App. Div. 2022); ***Nail Nook, Inc. v. Hiscox Ins. Co. Inc.***, 182 N.E.3d 356 (Ohio Ct. App. 2021); ***Colectivo Coffee Roasters Inc. v. Society Ins.***, 401 Wis.2d 660, 974 N.W.2d 442 (2022).

31** Instantly, the trial court relied on ***In re Soc'y Ins. Co. Covid-19 Bus. Interruption Prot. Ins. Litig., 521 F.Supp.3d 729 (N.D. Ill. 2021). There, the Federal District Court found a factual issue as to whether the insured restaurant and hospitality businesses suffered a direct physical loss of their property as a result of the loss of in-person dining during the Covid-19 pandemic. The insureds argued that the presence of Covid-19 on their premises was physical damage that created the loss. ***Id.*** at 732. The District Court reasoned that the policy in question did not contain a virus exclusion. ***Id.***

at 735. Also, like the Majority and trial court instantly, the Northern District of Illinois relied on the disjunctive "or" in "direct physical loss of or damage to ..." supported an interpretation of the policy language whereby physical loss meant something different from physical damage. ***Id.*** at 741.

In any event, the weight of authority is to the contrary and the Seventh Circuit has implicitly overruled ***In re Soc'y***, concluding that commercial property policies do not provide coverage for business interruptions due to Covid-19. ***Sandy Point Dental***, 20 F.4th 327 (7th Cir. 2021). Likewise, in ***Hair Studio 1208, LLC v. Hartford Underwriter's Ins. Co.***, 539 F.Supp.3d 409 (E.D. Pa. 2021), the Federal District Court cited ***Port Authority*** for the proposition that physical loss exists when a structure is "uninhabitable and unusable." ***Id.*** at 417. Pure economic loss is not property damage. ***Id.*** Said another way, policy language covering "direct physical loss or damage" unambiguously requires that the "claimed loss or damage must be physical in nature." ***Id.*** at 418 (quoting ***Philadelphia Parking Auth. v. Fed. Ins. Co.***, 385 F.Supp.2d 280, 289 (S.D.N.Y. 2005)). [4]

4 In ***Philadelphia Parking Auth.***, the Southern District of New York held that economic loss stemming from loss of business after the September 11, 2001 terrorist attacks was not covered.

Cases cited by Ungarean and various *amici* do not refute this point. In ***Motorists Mut. Ins. Co. v. Hardinger***, 131 Fed. App'x 823, 826 (3d Cir. 2005), for example, the Third Circuit found a question of fact as to whether an e coli contamination of well water was a "physical loss" under a homeowner's policy. The family alleged they vacated the house because all of them experienced persistent illnesses and skin problems upon moving in. ***Id.*** at 824. Thus, the facts in ***Hardinger*** met the test set forth in ***Port Authority of New York***, wherein the Third Circuit wrote that invisible damage constitutes physical loss where it renders the building unusable or uninhabitable. 311 F.3d at 236 The same is true of cases where buildings became unusable due to the presence of gas or noxious fumes. ***See Essex Ins. Co. v. BloomSouth Flooring Corp.***, 562 F.3d 399 (1st Cir. 2009) (holding that the presence of an unexplained chemical odor sufficiently alleged a physical injury to the insured's building, thus triggering the insurer's duty to defend); ***TRAVCO Ins. Co. v. Ward***, 715 F.Supp.2d 699, 707 (E.D. Va. 2010) (holding that a noxious odor emitting from defective drywall constituted a direct physical loss), ***aff'd***, 504 Fed. App'x 251 (4th Cir. 2013) ***Western Fire Ins. Co. v. First Presbyterian Church***, 165 Colo. 34, 437 P.2d 52 (1968) (holding that the insured suffered a direct physical loss where gasoline accumulated in the soil under and around the insured's building and gasoline vapors rendered the building uninhabitable).

In these cases, the condition that caused the loss, though not visible, was physically present in the insured property, not easily remediable or removable, and/or not likely to dissipate quickly on its own. [5] In contrast, the case before us arises from restrictions on Ungarean's use of his property in response to a highly contagious airborne virus that workers and patrons might bring in with them and spread to others. Ungarean did not allege that the Covid-19 virus was present on any surface in his covered property, nor did he allege that its temporary presence in his covered property was the reason for his prolonged inability to perform nonemergency dental work.

5 Much has been made of the observation in Couch on Insurance that "physical alteration" is the most common coverage trigger for a policy insuring against "physical loss or damage" to covered property. COUCH ON INSURANCE, § 148:46 (3d ed. 2000). Because the analysis in § 148:46 neither relied on nor anticipated the present circumstances, I do not find it helpful. In my view, neither side of this debate advances its argument by citing or attacking the conclusions reached in § 148:46.

***32** In light of all the foregoing, the proper disposition of this appeal is clear. The provisions of the Policy at issue here cover commercial property. Ungarean does not allege that any covered property was destroyed, damaged, or in need of repair, rebuilding, or replacing. He had access to his business property at all times; there was no physical alteration to the property itself that prevented him from using it as normal. Rather, he was limited to performing emergency dental procedures so as to limit the number of patients coming in and thereby limit the potential for person-to-person spread of Covid. There is no reasonable reading of the phrase "direct physical loss" that applies to the covered property involved in this case. [6] Ungarean's claim fails for this reason alone.

6 The trial court justified its result by relying in part on a dictionary definition of loss: "loss is defined as DESTRUCTION, RUIN, ... [and/or] the act of losing possession [and/or] DEPRIVATION ..." Trial Court Opinion, 8/2/21, at 12 (pagination ours) (**citing** https://www.merriam-webster.com/

> dictionary/loss). Given the disjunctive "or" between "loss" and "damage" in the Policy language, the trial court concluded that loss must mean something other than destruction. Therefore, the trial court relied on the portion of the definition defining loss as "the act of losing possession [and/or] DEPRIVATION." ***Id.*** We are unable to confirm the accuracy of the trial court's citation. Merriam Webster's online dictionary contains seven entries under "loss." The first entry, "DESTRUCTION, RUIN" appears exactly as quoted in the trial court's opinion. https://www.merriam-webster.com/dictionary/loss (last visited October 13, 2022). The remainder of the definition as quoted and relied on by the trial court—"the act of losing possession [and/or] DEPRIVATION"—appears nowhere. ***Id.*** This definition does not support a conclusion that "direct physical loss", as used in the Policy, encompasses a mere loss of use.

The Majority's argument from the Policy's disjunctive language is unavailing. According to the Majority's reading of "direct physical loss of **or** damage to ...", the phrases on either side of the word "or" must mean something different. Indeed, they do, as is evident from the period of restoration clause (and the extra expense clause, quoted above, which also ties itself to the period of restoration). The period of restoration is the time period necessary to "repair, replace, or rebuild" any part of the covered property that had been "damaged or destroyed." Thus, where there is a "physical loss"—*i.e.* total loss or destruction of covered property—the period of restoration is the time necessary to rebuild or replace it. Where there is partial "damage to" covered property the period of restoration is the time necessary to make repairs. Thus, the appropriate, and by far the most reasonable, distinction between "physical loss" and "damage" is to read the former as applying in cases of total loss and the latter as applying in cases of partial damage. The terms "repair, replace, or rebuild" make sense only in the case of physical damage to or physical destruction (loss) of the property. They make no sense in a case of pure economic loss. ***See e.g.***, ***Dino Drop, Inc. v. Cincinnati Ins. Co.***, 544 F.Supp.3d 789, 798 (E.D. Mich. 2021) (holding that physical loss and damage "can only be reasonably be construed as extending to events that impact the physical premises completely (loss) or partially (damage).").

The Majority's reading—that the "period of restoration" is merely a time limit for coverage that has no bearing on the meaning of "direct physical loss"—does not withstand scrutiny. ***See*** Majority Opinion, at 12. In addition to its failure to account for the words "repair, rebuild, or replace," it is not clear how the "period of restoration" is to be computed in the case before us, wherein the insured has alleged neither destruction of or damage to covered property nor the need to rebuild, repair, or replace any part of it. Rather, Ungarean alleges a partial loss of use of his property because he was forbidden to perform non-emergency dental procedures. There simply was no period of restoration involved in this case.

***33** The Majority and the trial court have engaged in a strained reading of a property insurance policy in order to find coverage for a purely economic loss. The conclusion they reach is unsupportable and unreasonable under the plain language of the Policy and case law governing the interpretation of insurance policies. While I sympathize with the plight of the many business owners who have suffered, and continue to suffer, significant financial hardship because of the Covid-19 pandemic, this Court must render decisions based on the law and the facts of each case. In my view, the applicable law, the Policy language, and the facts before us lead inexorably to the conclusion that the trial court erred in granting summary judgment in favor of Ungarean and denying Appellants' competing motion for summary judgment.

Alternatively, the Majority concludes that none of the Policy exclusions apply to coverage claimed by Ungarean and therefore, the trial court properly declared that CNA was obligated to provide business loss and extra expense coverage. I conclude this alternative analysis to be unnecessary. If there is no right to coverage under the insuring provision, then it is a non sequitur to consider if any exclusions apply.

Likewise, I disagree with the trial court's conclusion, affirmed by the Majority, that Ungarean was entitled to coverage under the Civil Authority Provision of the Policy that provides:

> When the Declarations show that you have coverage for Business Income and Extra Expense, you may extend that insurance to apply to the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by action

> of civil authority that prohibits access to the described premises. The civil authority action must be due to **direct physical loss of or damage to property** at locations, other than described premises, caused by or resulting from a Covered Cause of Loss.

CNA Policy, Civil Authority, at 1. (Emphasis added). I conclude that Ungarean failed to establish a claim for coverage under the Policy's Civil Authority provision, which provides in essence that the coverage exists when a civil authority limits Ungarean's access to his own covered property because of direct physical loss of or damage to property at another location. The trial court found that other properties suffered direct physical loss or damage for the same reason it found that Ungarean's business premises were damaged. I reach a different conclusion for the reasons already explained.

I respectfully dissent, and would reverse the trial court and enter judgment in favor of Appellants CNA and Valley Forge Insurance Company, and against Appellee, Timothy A. Ungarean.

President Judge Emeritus Bender, Judge Bowes, and Judge King join the dissenting opinion.

All Citations

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EXHIBIT B

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Court of Appeal, Second District, Division 7, California.

SHUSHA, INC., Plaintiff and Appellant,
v.
CENTURY-NATIONAL INSURANCE COMPANY, Defendant and Respondent.

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Filed 12/14/2022

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel J. Buckley, Judge. Reversed. (Los Angeles County Super. Ct. No. 20STCV25769)

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Opinion

FEUER, J.

***1** Shusha, Inc., dba La Cava (La Cava) appeals from the judgment of dismissal entered after the trial court sustained without leave to amend the demurrer filed by Century-National Insurance Company (Century-National) to La Cava's first amended complaint. La Cava sued Century-National for breach of an insurance contract and related claims after Century-National denied coverage for La Cava's lost business income as a result of its suspension of restaurant operations in March 2020 due to the COVID-19 [1] pandemic and associated government shutdowns.

[1] For ease of reference, we refer, as do the parties, to the SARS-CoV-2 virus, its variants, and the coronavirus disease caused by them as COVID-19.

On appeal, La Cava contends the trial court erred in concluding the alleged presence of the COVID-19 virus in its restaurant did not constitute "direct physical loss of or damage to" the restaurant necessary for coverage under the terms of the policy at issue. La Cava also argues Century-National acted in bad faith by summarily denying coverage without investigating La Cava's claim. We agree La Cava's allegations that contamination by the COVID-19 virus physically altered its restaurant premises were sufficient to withstand demurrer, and we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Century-National Insurance Policy*

As alleged in the operative first amended complaint (complaint), La Cava purchased from Century-National a "commercial package" insurance policy, including commercial property insurance and general liability coverage for a one-year period beginning November 22, 2019 (the policy). A copy of the policy was attached to the complaint.

Section A.1 of the "Business Income (and Extra Expense) Coverage Form" provided in relevant part, "We will pay for the actual loss of business income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The 'suspension' must be caused *by direct physical loss of or damage to property* at premises which are described in the declarations and for which a business income limit of insurance is shown in the declarations ...." (Capitalization omitted and italics added.) "Suspension" was defined to mean, in pertinent part, "[t]he slowdown or cessation of your business activities." The "period of restoration" was defined in part as the period that "begins with the date of direct physical loss or damage caused by or resulting from any covered cause of loss at the described premises" and ends on the earlier of "the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality" or "one year immediately following the date of direct physical loss or damage caused by a covered cause of loss." (Capitalization omitted.)

Section A.5.a of the business income coverage form also included civil authority coverage. This provision provided, "We will pay for the actual loss of business income you sustain and necessary extra expense caused by action of civil authority that prohibits access to the described premises *due to direct physical loss of or damage to property, other than at the described premises*, caused by or resulting from any covered cause of loss." (Capitalization omitted and italics added.)

B. *The Complaint*

***2** La Cava filed this action on July 7, 2020. The first amended complaint alleged causes of action for declaratory judgment, breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair business practices in violation of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.). Each cause of action was premised on Century-National's denial of coverage for business income losses claimed by La Cava as a result of the COVID-19 pandemic.

La Cava is a restaurant in the Sherman Oaks neighborhood of Los Angeles. As alleged, La Cava "promptly shut down operations" on or around March 16, 2020, "[o]nce the La Cava management was made aware by [pandemic-related government orders] of the clear and present danger of the virus and its existence everywhere in LA County, including on the surfaces and in the air in and around La Cava's premises." On April 1, 2020 La Cava reopened with limited hours for take-out and delivery only, "prohibiting customers from dining in."

The complaint described and attached several government orders relating to the pandemic. On March 4, 2020 the Governor of California declared a state of emergency due to the rapid spread of COVID-19 in California, and on March 15 the Mayor of Los Angeles issued a public health order prohibiting restaurants in the city from serving food on their premises. On March 19 the Governor issued Executive Order No. N-33-20 requiring residents of California to stay in their homes, with limited exceptions. Also on March 19, the Mayor issued a "Safer at Home" public order, finding "the COVID-19 virus can spread easily from person to person and it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time." (Capitalization omitted.) The Mayor's order provided restaurants could offer food to customers "but only via delivery service, to be picked up, or drive-thru." In May, restaurants were again permitted to serve customers on-site by moving all dining outdoors, limiting group size, and spacing tables, among other restrictions. However, on November 22, 2020 the Los Angeles County Department of Health suspended outdoor dining at restaurants, and the Governor did not lift statewide stay-at-home orders to allow restaurants to reopen for outdoor dining until January 25, 2021.

The complaint included numerous allegations concerning the transmissibility of the COVID-19 virus and unfolding pandemic in California. Citing reports by the World Health Organization (WHO) and the Center for Disease Control and Prevention (CDC), the complaint alleged the COVID-19 virus can spread through "[f]loating respiratory droplets, called aerosols" that "behave like smoke," and it can both " 'linger in the air for minutes to hours' " and also "travel[ ] on air currents until they attach to an object or other surface." The WHO and CDC "have recognized the tendency of the [COVID-19 virus] to attach to objects and surfaces, 'such as tables, doorknobs, and handrails,' " and the virus " 'may remain viable for hours to days on surfaces made from a variety of materials.' " The complaint alleged further, "Numerous other scientific studies have discovered that the [COVID-19] virus can survive and persist on surfaces and buildings for nearly a month." Moreover, "The scientific community has confirmed that coronavirus and COVID-19 alter the conditions of properties and buildings such that the premises are no longer safe and habitable for normal use. Without substantial physical alterations, systems changes to facilities, and new protocols for air circulation, disinfection, and disease prevention, an infected property cannot remain open to the public. Cleaning of surfaces alone is insufficient."

***3** Specifically, according to one WHO publication, the COVID-19 virus "adheres to, attaches to, and alters the surfaces of the property and surfaces upon which ... physical droplets land, and physically changes these once safe surfaces to 'fomites.' Fomites are objects, previously safe to touch, that now serve as agents and [a] mechanism for transmission of deadly, infectious viruses and diseases." "Thus, the coronavirus and COVID-19 physically change properties and surfaces such that contact with these properties and surfaces, which previously would have been safe, is now deadly and dangerous. This constitutes real and severe damage to and loss of the properties."

The complaint alleged La Cava suffered physical loss of or damage to its dining rooms and other property "caused by the actual presence of virus droplets in the air and

on the surfaces in the vicinity of and in [its] restaurant" and "in the form of virus matter present on walls, floors, tables, chairs, silverware, dishes, and other surfaces." The complaint identified 10 commercial businesses, including three restaurants, in Sherman Oaks and its environs, where employees contracted COVID-19. Three of La Cava's employees suffered from COVID-19 in December 2020 and January 2021. The complaint alleged on information and belief that "La Cava is aware that it entertained customers since March 2020 who subsequently tested positive for COVID-19 and who had the ability to use the restroom facilities during the time they were outside dining." "[T]he virus ... is therefore certain to have been present at La Cava at various times," and "droplets containing SARS-CoV-2 have been physically present at the La Cava restaurant premises insured by the Policy at all relevant times." The complaint alleged further in paragraph 81, "The presence of droplets containing coronavirus at La Cava led to its closure and constitutes covered physical damage to [La Cava's] premises. Once the La Cava management was made aware by the Orders of the clear and present danger of the virus and its existence everywhere in LA County, including on the surfaces and in the air in and around La Cava's premises, it promptly shut down operations."

In addition to lost business revenue due to the suspension of operations, La Cava "incurred substantial costs in an attempt to mitigate the suspension of its operations, including but not limited to expenses incurred for reconfiguration to outside dining and increased sanitation procedures. [La Cava] would not have incurred those costs but for the direct physical loss or damage caused by the coronavirus, COVID-19, and the [government] Orders."

On March 18, 2020, two days after its initial suspension of operations, La Cava submitted a claim to Century-National by telephone for the income lost as a result of the virus and the related government orders. As alleged, Century-National "undertook no steps to determine whether the virus had caused physical damage to the La Cava premises." Instead, "without engaging in any legitimate, true, meaningful, or thorough investigation, [Century-National] denied [La Cava's] claim." Specifically, on April 9, 2020 Century-National (through its claims adjuster) responded in a letter stating the business income coverage did not apply to the claim because "[t]he suspension of your business was not caused by a 'direct physical loss of or damage to property' at your designated premises" and "[t]he government directives at issue did not 'prohibit access' to your designated premises and did not result from a loss or damage at ... premises 'other than' your designated premises." (Capitalization omitted.)

La Cava's first cause of action for declaratory judgment sought a declaration that Century-National was obligated to provide coverage for losses incurred in connection with La Cava's COVID-19-related claims. The second cause of action for breach of contract alleged La Cava "suffered the direct physical loss of property and lost business income following California's Stay at Home Order and due to the presence of the coronavirus in and around its premises —losses which were covered under the Policy purchased from [Century-National]." These losses included "loss of and damage to some or all of [La Cava's] covered property and its functionality, which became useless, dangerous, or uninhabitable, resulting in substantial loss of business income, lost revenue from having to suspend or limit its operations, and extra expenses incurred to mitigate the suspension of its operations." The complaint also alleged there were no relevant policy exclusions, and La Cava complied with the terms and conditions of the policy.

***4** The third cause of action for breach of the implied covenant of good faith and fair dealing alleged Century-National engaged in bad faith by, among other things, denying La Cava's claim without undertaking steps to determine whether the virus had caused physical damage to the premises, "[u]nreasonably refusing to conduct a thorough investigation of [La Cava's] claims, and ignoring evidence that supports coverage instead of inquiring into possible bases that might support [La Cava's] claim." The fourth cause of action for violation of the UCL, pleaded as a class claim,[2] alleged Century-National engaged in unlawful conduct in violation of Insurance Code section 790 et seq. by categorically denying La Cava's and other class members' claims without a fair investigation.

2 The class allegations are not at issue in this appeal.

C. *Century-National's Demurrer*

On April 14, 2021 Century-National filed a demurrer to the first amended complaint.[3] Century-National argued that under California law, the phrase "direct physical loss or damage to property" in an insurance contract requires a physical alteration of the insured property, but La Cava did not and could not allege its loss of business income was attributable to any physical alteration of La Cava's property by the COVID-19 virus. In support of its position, Century-

National cited nearly two dozen decisions from federal district courts in California holding business closures due to the COVID-19 virus or related government orders did not result from direct physical loss of or damage to property and dismissing the insured's claims based on the denial of coverage. In addition, the civil authority coverage under the policy did not cover the losses because the government shutdown orders did not prohibit access to La Cava's premises and were not issued "due to direct physical loss or damage to property" at La Cava, as provided in the policy. Further, Century-National did not act in bad faith because it properly denied coverage based on an "undeniably" genuine dispute as to the existence of coverage as shown by the fact "nearly every judge in California to consider the coverage issues herein has found no coverage for these COVID-19 business-interruption claims."

[3] On February 19, 2021 the trial court sustained Century-National's demurrer to the original complaint with leave to amend. The original complaint did not include the allegations that since March 2020 three of La Cava's employees and many of its customers and the employees of nearby businesses tested positive for the COVID-19 virus.

After a hearing, on June 2, 2021 the trial court sustained Century-National's demurrer without leave to amend. Citing five federal district court decisions in California denying coverage and observing that "substantially all of the federal district courts" were in agreement, the court found, "[C]ourts have routinely held, and this Court agrees, that the existence of COVID-19 in the air or on surfaces does not constitute 'direct physical loss of or damage to property' within the meaning of the insurance policy." Accordingly, La Cava's allegations were insufficient as a matter of law to establish a covered loss. Civil authority coverage did not apply for the additional reason that La Cava failed to allege facts demonstrating it was "prohibited from accessing its building." Because La Cava could not allege it was entitled to coverage under any provision of the policy, all four causes of action failed, and La Cava had not demonstrated a basis for leave to amend. The court entered a judgment of dismissal on June 16, 2021.

La Cava timely appealed.

DISCUSSION

A. *Standard of Review*

" 'In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.' " (*Mathews v. Becerra* (2019) 8 Cal.5th 756, 768; accord, *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162.) When evaluating the complaint, "we assume the truth of the allegations." (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 209; accord, *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230.) "However, we are not required to accept the truth of the factual or legal conclusions pleaded in the complaint." (*Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Insurance Company* (2022) 81 Cal.App.5th 96, 105 (*Marina Pacific*); accord, *Mathews*, at p. 768 ["""We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law."""].)

B. *Interpretation of Insurance Contracts*

***5** "In general, interpretation of an insurance policy is a question of law that is decided under settled rules of contract interpretation." (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 194; accord, *Marina Pacific, supra*, 81 Cal.App.5th at p. 105.) "The principles governing the interpretation of insurance policies in California are well settled. 'Our goal in construing insurance contracts, as with contracts generally, is to give effect to the parties' mutual intentions. [Citations.] "If contractual language is clear and explicit, it governs." [Citations.] If the terms are ambiguous [i.e., susceptible of more than one reasonable interpretation], we interpret them to protect " 'the objectively reasonable expectations of the insured.' " [Citations.] Only if these rules do not resolve a claimed ambiguity do we resort to the rule that ambiguities are to be resolved against the insurer.' " (*Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 321; accord, *Montrose Chemical Corp. of California v. Superior Court* (2020) 9 Cal.5th 215, 230; *Marina Pacific*, at p. 105.)

"The 'tie-breaker' rule of construction against the insurer stems from the recognition that the insurer generally drafted the policy and received premiums to provide the agreed protection." (*Minkler v. Safeco Ins. Co. of America, supra*, 49 Cal.4th at p. 321; accord, *Marina Pacific, supra*, 81 Cal.App.5th at p. 106.) "To further ensure that coverage conforms fully to the objectively reasonable expectations of the insured, ... in cases of ambiguity, basic coverage provisions are construed broadly in favor of affording

protection, but clauses setting forth specific exclusions from coverage are interpreted narrowly against the insurer. The insured has the burden of establishing that a claim, unless specifically excluded, is within basic coverage, while the insurer has the burden of establishing that a specific exclusion applies." (*Minkler*, at p. 322; accord, *Montrose Chemical Corp. of California v. Superior Court, supra*, 9 Cal.5th at p. 230; *Marina Pacific*, at p. 106.)

C. *Coverage for COVID-19 Pandemic-related Losses*

At the time the trial court sustained the second demurrer, no California appellate court had addressed whether business losses caused by the COVID-19 pandemic were covered by commercial property insurance. Multiple California appellate courts have now addressed this question, but with differing results. In *Marina Pacific, supra*, 81 Cal.App.5th 96, we addressed whether the owners of an insured restaurant and hotel had sufficiently pleaded they had suffered "direct physical loss of or damage to" the property supporting coverage under a commercial property insurance policy based on allegations of contamination of the insured premises with the COVID-19 virus. [4] We concluded they had.

[4] Our decision in *Marina Pacific* was filed on July 13, 2022, after La Cava's reply brief was filed. Century-National addressed our decision in its July 26 answer to the amicus brief filed by United Policyholders in support of La Cava, and the American Property and Casualty Insurance Association and the National Association of Mutual Insurance Companies addressed the decision in their amicus brief in support of Century-National, also filed on July 26, 2022. On July 27 we invited the parties to address *Marina Pacific* in any answer to an amicus brief or a supplemental brief. La Cava addressed our decision in its August 15 answer.

In *Marina Pacific*, the owners sued their insurer for breach of contract and related claims after the insurer denied coverage for losses claimed as a result of the COVID-19 pandemic. (*Marina Pacific, supra*, 81 Cal.App.5th at p. 102.) The policy provided business interruption coverage for " 'the actual loss of business income and necessary extra expense you sustain due to the necessary suspension of your operation during the period of restoration arising from direct physical loss or damage to [covered] property.' " [5] (*Id.* at p. 99.) As we explained, the owners' complaint alleged the COVID-19 virus "not only lives on surfaces but also bonds to surfaces through physicochemical reactions involving cells and surface proteins, which transform the physical condition of the property. The virus was present on surfaces throughout the insured properties, including the hotel lobby, kitchens at both the hotel and restaurant, employee breakroom, service elevator and parking garage, as well as on the properties' food, bedding, fixtures, tables, chairs and countertops. Because of the nature of the pandemic, the virus was continually reintroduced to surfaces at those locations. As a direct result, the [owners] were required to close or suspend operations in whole or in part at various times and incurred extra expense as they adopted measures to restore and remediate the air and surfaces at the insured properties. The [owners] specifically alleged they were required to 'dispose of property damaged by COVID-19 and limit operations at the Insured Properties.' " (*Id.* at pp. 108-109.)

[5] The policy at issue in *Marina Pacific* also included " 'communicable disease coverage' " for " 'direct physical loss or damage' to insured property 'caused by or resulting from a covered communicable disease event,' including costs necessary to repair or rebuild insured property damaged or destroyed by the communicable disease and to '[m]itigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor and assess the effects [of] the communicable disease.' " (*Marina Pacific, supra*, 81 Cal.App.5th at p. 100.) The communicable disease coverage also covered losses from the suspension of operations " 'due to direct physical loss or damage to property at a location caused by or resulting from a covered communicable disease event.' " (*Ibid.*) The policy at issue here does not contain a similar provision.

***6** Based on these allegations, we reversed the trial court's order sustaining the insurer's demurrer without leave to amend. (*Marina Pacific, supra*, 81 Cal.App.5th at p. 114.) We assumed for purposes of our opinion that the undefined policy term "direct physical loss or damage" meant the owners needed to allege an external force acted on the insured property causing a "distinct, demonstrable, physical alteration of the property," as stated in *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766 (*MRI Healthcare*). (See *Marina Pacific*, at p. 108; *MRI Healthcare*, at pp. 770, 779 [failure of MRI machine to function after it was demagnetized to enable roof repair following storms was not a covered loss because "there was

no 'distinct, demonstrable [or] physical alteration' of the MRI machine"].)

We concluded the complaint adequately alleged physical alteration of the premises, explaining, "Assuming, as we must, the truth of those allegations, even if improbable, absent judicially noticed facts irrefutably contradicting them, the insureds have unquestionably pleaded direct physical loss or damage to covered property within the definition articulated in *MRI Healthcare*—a distinct, demonstrable, physical alteration of the property." (*Marina Pacific, supra,* 81 Cal.App.5th at p. 109.) We recognized our holding was at odds with many federal district court decisions dismissing claims for pandemic-related business losses. (*Ibid.*) But those cases did not involve similar factual allegations, and to the extent they were analogous, federal pleading standards, unlike California's, permitted the district courts to dismiss the claims. (*Id.* at pp. 109-110.) We observed, "Unlike in federal court, the plausibility of the insureds' allegations has no role in deciding a demurrer under governing state law standards, which ... require us to deem as true, 'however improbable,' facts alleged in a pleading—specifically here, that the COVID-19 virus alters ordinary physical surfaces transforming them into fomites through physicochemical processes, making them dangerous and unusable for their intended purposes unless decontaminated.' " (*Marina Pacific*, at pp. 109-110; see *Hacker v. Homeward Residential, Inc.* (2018) 26 Cal.App.5th 270, 280 [in considering the merits of a demurrer, " 'the facts alleged in the pleading are deemed to be true, however improbable they may be' "].)

We also addressed three published Court of Appeal decisions that had addressed pandemic coverage, each affirming an order sustaining the insurer's demurrer. We concluded *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753 and *Inns-by-the-Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688 (*Inns-by-the-Sea*) were distinguishable because both involved only allegations of loss of use of the insured property as a result of government-ordered closures to limit the spread of COVID-19, "rather than, as expressly alleged here, a claim the presence of the virus on the insured premises caused physical damage to covered property, which in turn led to business losses." (*Marina Pacific, supra*, 81 Cal.App.5th at p. 110; see *Musso & Frank*, at pp. 758-759 [policy requiring physical loss or damage to property did not cover losses incurred as a result of pandemic-related order mandating that restaurants close by midnight]; *Inns-by-the-Sea*, at p. 703 ["Inns alleges that it ceased operations 'as a direct and proximate result of the Closure Orders.' It does not make the proximate cause allegation based on the particular presence of the virus on its premises."].) [6]

6 As argued by amicus curiae United Policyholders, the Fourth District in *Inns-by-the-Sea, supra*, 71 Cal.App.5th at page 710 observed that "a virus could cause a suspension of operations through direct physical loss of or damage to property," and noted that "case law supports the view that ... an invisible substance or biological agent might give rise to coverage because it causes a policyholder to suspend operations due to direct physical loss of or damage to property." (*Id.* at p. 710, fn. 21.) Although such allegations were absent in *Inns-by-the-Sea*, the court noted, " 'It could be a different story if a business—which could have otherwise been operating—had to shut down because of the presence of the virus within the facility. For example, a restaurant might need to close for a week if someone in its kitchen tested positive for COVID-19, requiring the entire facility to be thoroughly sanitized and remain empty for a period. Perhaps the restaurant could successfully allege that the virus created physical loss or damage in the same way some chemical contaminant might have.' " (*Id.* at pp. 704-705.)

***7** We recognized the decision by our colleagues in Division Four of this district in *United Talent Agency v. Vigilant Ins. Co.* (2022) 77 Cal.App.5th 821 was not distinguishable in that it presented similar allegations to those at issue in *Marina Pacific*. (*Marina Pacific, supra*, 81 Cal.App.5th at p. 111.) In *United Talent*, the Court of Appeal affirmed an order sustaining the insurer's demurrer, concluding allegations that the presence of the COVID-19 virus on property constituted direct physical loss or damage were insufficient as a matter of law to trigger coverage because "the virus exists worldwide wherever infected people are present, it can be cleaned from surfaces through general disinfection measures, and transmission may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks. Thus, the presence of the virus does not render a property useless or uninhabitable, even though it may affect how people interact with and within a particular space." (*United Talent*, at p. 838.) We rejected this approach, reasoning, "We are not authorized to disregard those allegations when evaluating a demurrer ... based on a general belief that surface cleaning may be the

only remediation necessary to restore contaminated property to its original, safe-for-use condition." (*Marina Pacific*, at p. 111.) Moreover, "[e]ven if there had been evidence subject to proper judicial notice to establish that disinfecting repaired any alleged property damage, it would not resolve whether contaminated property had been damaged in the interim, nor would it alleviate any loss of business income or extra expenses.... [T]he duration of exposure may be relevant to the measure of policy benefits; it does not negate coverage." (*Id.* at p. 112.)

Since our *Marina Pacific* decision, Division Two of the First District has published two opinions addressing COVID-19 pandemic-related losses under policies providing coverage for direct physical loss of or damage to property. In *Apple Annie, LLC v. Oregon Mutual Ins. Co.* (2022) 82 Cal.App.5th 919, 925, the Court of Appeal affirmed an order sustaining the insurer's demurrer, holding a restaurant owner failed to allege direct physical loss of or damage to its restaurant where the owner alleged only that its business losses were due to suspension of operations under state and county orders. In supplemental briefing after *Marina Pacific* was decided, the owner acknowledged *Marina Pacific* " 'does not directly implicate [the owner's] theory of coverage,' " but it argued there was a reasonable possibility it could amend its complaint to include allegations similar to those in *Marina Pacific*. (*Id.* at pp. 936-937.) However, because at oral argument the owner's attorney stated as an officer of the court he could not state what facts he could allege in an amended complaint, the Court of Appeal concluded the owner did not meet its burden to obtain leave to amend. (*Id.* at p. 936.) In *Tarrar Enterprises, Inc. v. Associated Indemnity Corp.* (2022) 83 Cal.App.5th 685, 688-689, the Court of Appeal held that although the trial court properly sustained the insurer's demurrer because the insured had not alleged direct physical loss of or damage to property, the court abused its discretion in denying leave to amend because the insured's appellate briefs set forth "in some detail" the proposed amendments. [7]

7 In *Amy's Kitchen, Inc. v. Fireman's Fund Ins. Co.* (2022) 83 Cal.App.5th 1062, 1070-1071, Division Four of the First District interpreted a policy providing coverage for a communicable disease event not to require physical alteration of the premises because the policy language specifically referred to coverage for the costs to disinfect, cleanup, and remove the communicable disease. The Court of Appeal reversed the trial court order, holding the court should have granted leave to amend to plead a communicable disease event. (*Id.* at pp. 1072-1073.)

D. *The Trial Court Erred in Sustaining the Demurrer*

1. *La Cava adequately stated causes of action for breach of contract and declaratory judgment based on alleged direct physical loss or damage to its property caused by the COVID-19 virus*

On appeal, La Cava contends the alleged contamination of its restaurant by the COVID-19 virus constituted a "physical change" sufficient to trigger coverage under the Century-National policy. Century-National and amici curiae argue the policy language providing coverage for a direct physical loss of or damage to property required a distinct, demonstrable, physical alteration of the property. Even assuming La Cava was required to allege a distinct, demonstrable physical alteration of the property to show coverage under the policy (as stated in *MRI Healthcare, supra*, 187 Cal.App.4th at page 779), [8] the allegations of the complaint were sufficient.

8 In its opening brief, La Cava argued the policy term "direct physical loss of or damage to" should not be interpreted to require a physical alteration, and the interpretive rule adopted in *MRI Healthcare, supra*, 187 Cal.App.4th 766 should be limited to cases involving intangible changes to personal property, not real property. However, La Cava acknowledged in its supplemental briefing that "in light of *Marina Pacific Hotel*'s holding that identical circumstances to La Cava's satisfy this standard, the dispute is no longer relevant."

***8** The first amended complaint alleged the virus was "certain to have been present at La Cava at various times," including "in the form of virus matter present on walls, floors, tables, chairs, silverware, dishes, and other surfaces." As alleged, this was because thousands of people visited La Cava in the weeks preceding the shutdown, and based on the spread of the pandemic, it was "beyond doubt that some —likely many—of them were infected with the virus and breathed virus matter onto surfaces at La Cava." Further, since March 2020 La Cava had patrons who subsequently tested positive for COVID-19 and who had the ability to use the restrooms although they were dining outside, and three employees contracted COVID-19 in late December 2020 and January 2021. (See *Marina Pacific, supra*, 81 Cal.App.5th at p. 108 [owners alleged virus "was present on surfaces throughout the insured properties"].)

The complaint also alleged health authorities and medical scientists advised that the virus "can remain on smooth surfaces for at least 28 days," and it "adheres to, attaches to and alters the surfaces of the property and surfaces" it comes into contact with, creating "fomites," which are "objects, previously safe to touch, that now serve as agents and mechanism for transmission of deadly, infections viruses and diseases." (See *Marina Pacific, supra*, 81 Cal.App.5th at p. 101 [owners alleged COVID-19 virus " 'actually bonds and/or adheres to such objects through physico-chemical reactions' " and " 'caus[es], among other things, a distinct, demonstrable or physical alteration to property' "].) "Cleaning of surfaces alone is insufficient," and safe operations would require "substantial physical alterations, systems changes to facilities, and new protocols for air circulation, disinfection, and disease prevention." Because routine cleaning was insufficient, "[t]he presence of droplets containing coronavirus at La Cava led to its closure and constitute[d] covered physical damage to [La Cava's] premises." As a result, La Cava lost business revenues and incurred substantial costs to mitigate the damage by reconfiguring its property and increasing its sanitization procedures. (See *Marina Pacific*, at pp. 108-109 [owners "were required to close or suspend operations in whole or in part at various times and incurred extra expense as they adopted measures to restore and remediate the air and surfaces at the insured properties"].)

As discussed, the trial court found these allegations were not sufficient as a matter of law, relying on federal decisions ruling out the possibility of covered losses and the absence of authority supporting La Cava's position. We disagree with the court's reasoning, as stated in its order sustaining the demurrer to the original complaint, that La Cava could not show the COVID-19 virus permanently damages surfaces because "it is well-known that SARS-CoV-2 surface contamination is ephemeral, and [La Cava] has not presented the Court with any authority holding that an ephemeral, pathogenic surface contamination qualifies as 'damage to' property under this or similar policies." As we discussed in *Marina Pacific, supra*, 81 Cal.App.5th at page 109, the insured is not required to provide authority at the pleading stage to support its position that contamination with the COVID-19 virus caused damage to the surfaces in its premises.

In its answer to the amicus brief filed by United Policyholders, Century-National argues *Marina Pacific* embodies a "narrow exception" to the general rule that pandemic-related damages are not recoverable under business loss coverage, and it urges us instead to follow the skeptical approach taken by Division Four of this district in *United Talent Agency v. Vigilant Ins. Co., supra*, 77 Cal.App.5th 821. We see no reason to deviate from our decision in *Marina Pacific*, which did not carve out simply a "narrow exception," as suggested by Century-National. Further, as discussed, the policy provisions at issue in *Marina Pacific* are not materially different from those in the Century-National policy. [9] Although Century-National is correct that we considered the communicable diseases coverage in construing the policy language in *Marina Pacific*, we concluded there was a sufficient, independent basis for lost business income coverage under the policy provision for losses due "to the necessary suspension of your operation during the period of restoration arising from direct physical loss or damage to [covered] property." (*Id*. at pp. 109, 112.)

9 Amici curiae American Property and Casualty Insurance Association and the National Association of Mutual Insurance Companies seek to distinguish *Marina Pacific* on similar grounds. They also contend that allowing La Cava's complaint to proceed would destabilize insurance markets by upholding claims for losses due to any regulation that limits a business's operations, such as a noise ordinance mandating early closure or a fire regulation reducing occupancy and requiring reconfiguration. We are unpersuaded. These types of regulations would not involve allegations that "an external force acted on the insured property causing a physical change in the condition of the property," as alleged by La Cava with respect to the COVID-19 virus contamination of its restaurant. (*Marina Pacific, supra*, 81 Cal.App.5th at p. 107; accord, *MRI Healthcare, supra*, 187 Cal.App.4th at p. 779.) Moreover, to the extent amici contend we should interpret the Century-National and similar policies not to apply to COVID-19 virus contamination for policy reasons, that is an argument best made to the Legislature, not directed to our review of the adequacy of the allegations in the first amended complaint.

***9** Century-National's argument that La Cava shut down because of the government closure orders, and not the COVID-19 pandemic fares no better. Century-National points to La Cava's allegation in paragraph 81 that "[o]nce the La Cava management was made aware by the Orders of the clear and present danger of the virus and its existence

everywhere in LA County, including on the surfaces and in the air in and around La Cava's premises, it promptly shut down operations." Although this allegation references the government orders, a fair reading of the allegation is that it was the orders that apprised La Cava of the existence and danger of the COVID-19 virus, not that the shut down happened as a result. Moreover, as alleged, the City of Los Angeles Mayor's May 15 public health order prohibited restaurants from serving food on site, limiting restaurants to delivery, pickup, or drive-through service of customers, but it did not require restaurants to shut down entirely. To the extent the complaint alleges La Cava initially shut down for two weeks, then modified its operations, due to the COVID-19 virus and the government orders, it is a question of fact for a summary judgment motion or trial whether the restaurant closure and modifications resulted from damage caused by the COVID-19 virus or the government orders.

Because La Cava sufficiently pleaded direct physical loss or damage to its property caused by the COVID-19 virus to trigger coverage, the trial court erred in sustaining the demurrer to the causes of action for breach of contract and declaratory judgment. " '[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff.' " (*Marina Pacific, supra*, 81 Cal.App.5th at p. 108; accord, *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Century-National's demurrer challenged only the third element, contending it did not breach its obligation to pay benefits under the policy because La Cava failed to allege damage to or loss of La Cava's premises within the meaning of the policy.[10] And the parties' coverage dispute is clearly a proper basis for a declaratory judgment cause of action. (Code Civ. Proc., § 1060 ["Any person interested ... under a contract ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action ... for a declaration of his or her rights and duties ..., including a determination of any question of construction or validity arising under the ... contract."]; see *Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546 [declaratory relief claimant must show "two essential elements: '(1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party' "].)

10 Because we conclude La Cava alleged loss of business income caused by direct physical loss of or damage to its property, we do not reach whether La Cava adequately alleged entitlement to civil authority coverage, which under the policy required government action that "prohibits access to the premises due to direct physical loss of or damage to the property, other than at the described premises ...."

2. *La Cava adequately alleged causes of action for bad faith and violation of the UCL based on Century-National's summary denial of its insurance claim*

As discussed, Century-National argued in its demurrer that even if the trial court were to find La Cava adequately alleged breach of the policy, La Cava could not state a claim for breach of the covenant of good faith and fair dealing because there was a genuine dispute over policy coverage in light of the fact "nearly every judge in California" that had considered the question of coverage for COVID-19-related business losses found no coverage. Although the trial court did not reach this argument, Century-National contends on appeal the complaint independently failed to state a claim for bad faith because the denial of La Cava's insurance claim turned on a disputed interpretation of the policy. La Cava has adequately alleged causes of action for bad faith and violation of the UCL.[11]

11 Century-National does not dispute that allegations sufficient to support a cause of action for breach of the covenant of good faith and fair dealing are also sufficient to support a claim for violation of the UCL. (See *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 380 ["[B]ad faith insurance practices may qualify as any of the three statutory forms of unfair competition. They are unlawful; the insurer's obligation to act fairly and in good faith to meet its contractual responsibilities is imposed by the common law, as well as by statute. They are unfair to the insured; unfairness lies at the heart of a bad faith cause of action. They may also qualify as fraudulent business practices."], citations and footnote omitted.)

***10** "[I]n a claim against an insurance carrier, 'there are at least two separate requirements to establish breach of the implied covenant [of good faith and fair dealing]: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause.' " (*Grebow v. Mercury Ins. Co.* (2015) 241 Cal.App.4th 564, 581; accord, *Tilbury Constructors, Inc. v. State Comp. Ins. Fund* (2006) 137

Cal.App.4th 466, 475.) It is "settled law in California that an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract." (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 347; accord, *Case v. State Farm Mutual Automobile Ins. Co., Inc.* (2018) 30 Cal.App.5th 397, 402.) "[W]here there is a *genuine* issue as to the insurer's liability under the policy ..., there can be no bad faith liability imposed on the insurer for advancing its side of that dispute." (*Chateau Chamberay*, at p. 347; accord, *Case*, at p. 402.)

However, " '[t]he genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A genuine dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds.' " (*Ghazarian v. Magellan Health, Inc.* (2020) 53 Cal.App.5th 171, 186.) "" '[T]he reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact, [but] becomes a question of law where the evidence is undisputed and only one reasonable inference can be drawn from the evidence.' "" (*Hedayati v. Interinsurance Exchange of the Automobile Club* (2021) 67 Cal.App.5th 833, 843; accord, *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co., supra*, 90 Cal.App.4th at p. 350 [affirming summary adjudication of bad faith claim in favor of insurer where insured offered only a two-page expert declaration expressing conclusory opinion the insurer had not conducted an adequate and thorough investigation of loss].)

The first amended complaint alleged Century-National "undertook no steps to determine whether the virus had caused physical damage to the La Cava premises," and "without engaging in any legitimate, true, meaningful, or thorough investigation," it summarily denied the claim. Further, Century-National responded to La Cava's policy claim with what "appears to be a form letter sent in response to business income claims arising from [government shutdown orders]" stating, in relevant part, "The suspension of your business was not caused by a 'direct physical loss of or damage to property' at your designated premises."

Century-National does not challenge the sufficiency of the allegations it failed to conduct any investigation of La Cava's claim; rather, it contends its denial was based on a disputed interpretation of the policy. But a genuine dispute foreclosing a bad faith claim exists only where the insurer's position is maintained "in good faith and on reasonable grounds." (*Ghazarian v. Magellan Health, Inc., supra*, 53 Cal.App.5th at p. 186.) At the pleadings stage, Century-National's denial of coverage just three weeks after La Cava tendered its claim and in the earliest days of our understanding of the novel COVID-19 virus, cannot be deemed as a matter of law to have been made in good faith with reasonable grounds. Century-National treats *Marina Pacific* as a sea change in the law and characterizes its own position in April 2020 as clearly justified by the later endorsement of that position by numerous district courts. But at the time, it was settled law that environmental contamination that resulted in physical damage could trigger business income coverage. (See *Inns-by-the-Sea, supra*, 71 Cal.App.5th 688, 703 [surveying pre-pandemic cases recognizing an insured could allege "the COVID-19 virus—like smoke, ammonia, odor, asbestos—is a physical force" and was present on insured premises and directly caused damage].) La Cava alleged COVID-19 was present and physically damaged its restaurant, and it alleged its insurance claim was not limited to civil authority coverage. And, as alleged, Century-National did not take any steps to determine whether COVID-19 caused physical damage to the La Cava premises before denying coverage.

DISPOSITION

***11** The judgment is reversed. The matter is remanded for the trial court to vacate its order sustaining the demurrer without leave to amend and to enter a new order overruling the demurrer. La Cava is to recover its costs on appeal.

We concur:

PERLUSS, P. J.

SEGAL, J.

All Citations

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EXHIBIT C

2022 WL 17332910
Superior Court of Pennsylvania.

MACMILES, LLC d/b/a Grant Street Tavern, Appellee
v.
ERIE INSURANCE EXCHANGE, Appellant

No. 1100 WDA 2021
|
Argued April 20, 2022
|
Filed November 30, 2022

Appeal from the Order Entered May 25, 2021, In the Court of Common Pleas of Allegheny County, Civil Division, at No: GD-20-007753, Christine A. Ward, J.

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BEFORE: PANELLA, P.J., BENDER, P.J.E., BOWES, J., LAZARUS, J., STABILE, J., KUNSELMAN, J., NICHOLS, J., McLAUGHLIN, J., and KING, J.

Opinion

OPINION BY STABILE, J.:

***1** Appellant, Erie Insurance Exchange ("Erie"), appeals from the May 25, 2021 order granting summary judgment in favor of Appellee, MacMiles, LLC d/b/a/ Grant Street Tavern ("MacMiles") and denying its motion for judgment on the pleadings. MacMiles owns and operates the Grant Street Tavern in Pittsburgh Pennsylvania. Like many similarly situated parties, MacMiles suffered a significant disruption of its business activity during the Covid-19 pandemic. And like many similarly situated parties, MacMiles believed its economic losses due to the loss of use of its business premises were covered under its commercial property insurance. Erie, like many other insurers who have issued policies with substantially similar terms, denied the claim because MacMiles' commercial property did not suffer any physical damage. This issue has made its way through many of our nation's federal and state courts, but it is an issue of first impression for this Court. Upon review, we reach the same result as the near-universal majority of courts to have addressed this issue: the policy does not cover mere loss of use of commercial property unaccompanied by physical alteration or other condition immanent in the property that renders the property itself unusable or uninhabitable. We therefore reverse the trial court's grant of summary judgment in favor of MacMiles and direct that judgment on the pleadings be granted in favor of Erie.

The specifics of the case before us are as follows. Erie sold MacMiles an insurance policy (the "Policy") covering, among other things, "physical loss of or damage to Covered Property [....]" Policy, Commercial Property Coverage Part, Section I, Coverages/Insuring Agreement. [1] In relevant part, the covered property in this case is the building wherein MacMiles operates the Grant Street Tavern. On March 6, 2020, in response to the spread of the Covid-19 virus, Governor Tom Wolf issued a Proclamation of Disaster Emergency. The proclamation was followed by a March 19, 2020 executive order directing the temporary closure of non-essential businesses. Restaurateurs such as MacMiles were limited to offering take out, drive-through, and/or delivery. Dine-in service was prohibited.

1 The Policy appears in the certified record as Exhibit "A" to Erie's answer and new matter. All citations to the Policy in this Opinion will refer to sections and paragraphs within the Policy's commercial property coverage part.

MacMiles claimed coverage under the Policy for the loss of use of its physical premises due to the Covid-19 pandemic and Governor Wolf's orders. Erie declined coverage and, on September 29, 2020, MacMiles filed a complaint for breach of contract and declaratory relief. On December 22, 2020, MacMiles filed a motion for summary judgment. Erie filed a cross motion for judgment on the pleadings on March 10, 2021. On May 25, 2021, the trial court entered an interlocutory order [2] granting partial summary judgment in favor of MacMiles, finding coverage under the business income protection portion of the Policy but a triable issue of fact under the civil authority provision (we discuss these in more detail below) and denying Erie's motion for judgment on the pleadings. This timely appeal followed.

2 The trial court certified the order for immediate appeal under 42 Pa.C.S.A. § 702(b):

> **(b) Interlocutory appeals by permission.--**When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.
>
> 42 Pa.C.S.A.§ 702(b). This Court has accepted jurisdiction pursuant to § 702(b) and Rules of Appellate Procedure 312 and 1311(a)(1), governing interlocutory appeals by permission.

***2** Erie presents two questions:

1. Did the trial court commit an error of law in granting MacMiles' motion for summary judgment in part, and denying Erie's motion for judgment on the pleadings on this record, concluding that MacMiles has shown direct physical loss of or damage to covered property where there was an alleged mere loss of use, absent any harm to the property.

2. Did the trial court commit an error of law in concluding that the Policy's Ordinance or Law exclusion does not apply to MacMiles' claims.

Erie's Brief at 3-4.

Summary judgment is appropriate where there is no genuine issue of fact as to the matter in controversy and the moving party is entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.2(1); ***Summers v. Certainteed Corp.***, 606 Pa. 294, 997 A.2d 1152, 1159 (2010). The pertinent facts are not in dispute. Indeed, MacMiles filed for summary judgment seeking a declaration that the Policy provides coverage given the undisputed facts. We are therefore called upon to interpret the Policy, a question of law for which our standard of review is *de novo* and our scope of review is plenary. ***Summers***, 997 A.2d at 1159-60.

An insured may invoke the Declaratory Judgments Act, 42 Pa.C.S.A. § 7531, *et seq.*, to determine whether an insurance contract covers an asserted claim. ***Genaeya Corp. v. Harco Nat'l Ins. Co.***, 991 A.2d 342, 346 (Pa. Super. 2010). Where the language of the policy is clear, this Court must give it effect. ***Indalex Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA***, 83 A.3d 418, 420 (Pa. Super. 2013), ***appeal denied***, 627 Pa. 759, 99 A.3d 926 (2014). "Also, we do not treat the words in the policy as mere surplusage and, if at all possible, we construe the policy in a manner that gives effect to all of the policy's language." ***Id.*** at 421. We will construe any ambiguity in favor of the insured. ***Id.*** at 420-21. "Contract language is ambiguous if it is reasonably susceptible to more than one construction and meaning." ***Pennsylvania Nat'l Mut. Cas. Ins. Co. v. St. John***, 630 Pa. 1, 106 A.3d 1, 24 (2014). The insured bears the initial burden of establishing that the asserted claim is covered. ***Erie Ins. Grp. v. Catania***, 95 A.3d 320, 322–23 (Pa. Super. 2014). If the insured is successful, the insurer bears the burden of establishing the applicability of an exclusion. ***Id.***

This dispute arises under a portion of the policy titled "Ultrapack Plus Commercial Property Coverage Part". The Policy provides:

> We will pay for direct physical "loss" of or damage to Covered Property at the premises described in the "Declarations" caused by or resulting from a peril insured against.

Policy, Commercial Property Coverage Part, Section I, Coverages/Insuring Agreement. The Policy's Property Coverage Part provides coverage for buildings, business personal property and personal property of others, and income protection. It also provides additional coverage for losses resulting from certain actions by civil authorities. We first address the income protection coverage, pursuant to which the trial court granted partial summary judgment in favor of MacMiles.

> ***3** Income Protection means loss of "income" and/or "rental income" you sustain due to partial or total "interruption of business" resulting directly from "loss" or damage to property on the premises described in "Declarations" from a peril insured against.

Policy, Commercial Property Coverage Part, Section I, Income Protection – Coverage 3, ¶ A. Section II of the Policy defines perils".

> This policy insures against direct physical "loss", except "loss" as excluded or limited in this policy.

Policy, Commercial Property Coverage Part, Section II, Perils Insured Against, Covered Cause of Loss.

> "Loss" means direct and accidental loss of or damage to covered property.

Policy, Commercial Property Coverage Part, Section XI, Definitions. Finally, the following terms govern the amount of insurance available for income protection coverage:

> We will pay the actual income protection loss for only such length of time as would be required to resume normal business operations. We will limit the time period to the shorter of the following periods:
>
> 1. The time period required to rebuild, repair, or replace such part of the Building or Business Property that has been damaged or destroyed as a direct result of an insured peril; or
>
> 2. Twelve (12) consecutive months from the date of loss.

Policy, Commercial Property Coverage Part, Section I, Income Protection – Coverage 3, ¶ D.

As set forth above, MacMiles alleges loss of use of its covered property (the building housing the Grant Street Tavern) due to the Covid-19 pandemic and the resulting orders from Governor Wolf. Erie denied coverage claiming that the Policy provides coverage in the event of total physical destruction (loss) of property or partial damage to property. According to Erie, loss of use unaccompanied by physical property damage does not trigger coverage.

The trial court, construing the phrase "direct physical loss of or damage to Covered Property", reasoned that the disjunctive "or" between "direct physical loss of" and "damage to Covered Property" supports a reasonable reading of the Policy whereby a "direct physical loss" need not necessarily result from physical or structural damage.

> The spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which [MacMiles] materially used its property and physical space. Indeed, the spread of COVID-19 and social distancing measures (with or without the Governor's orders) caused [MacMiles], and many other businesses, to *physically* limit the use of property and the number of people that could inhabit *physical* buildings at any given time, if at all. Thus, the spread of Covid-19 did not, as [Erie] contends, merely impose economic limitations. Any economic losses were secondary to the businesses' *physical* losses.

Trial Court Opinion, 5/25/21, at 14-15 (emphasis in original; citation omitted).

Regarding the amount of insurance provision, the trial court reasoned that it "merely imposes a time limit on available coverage, which ends whenever any required building, repairs, or replacements are completed to any damaged or destroyed property that might exist, *or* twelve (12) months after the initial date of the loss." ***Id.*** at 17. Because it merely imposes a time limit, the trial court found that the amount of insurance provision did not alter its interpretation of "physical loss or damage." ***Id.*** In essence, the trial court concluded that MacMiles' claim is covered because MacMiles' proposed reading of the Policy is a reasonable one. [3]

[3] The trial court relied in part on a dictionary definition of loss: "loss is defined as DESTRUCTION, RUIN, ... [and/or] the act of losing possession [and/or] DEPRIVATION ..." Trial Court Opinion, 8/2/21, at 12 (pagination ours) (**citing** https://www.merriam-webster.com/dictionary/loss). Given the disjunctive "or"

> between "loss" and "damage" in the Policy language, the trial court concluded that loss must mean something other than destruction. Therefore, the trial court relied on the portion of the definition defining loss as "the act of losing possession [and/or] DEPRIVATION." ***Id.*** We are unable to confirm the accuracy of the trial court's citation. Merriam Webster's online dictionary contains seven entries under "loss." The first entry, "DESTRUCTION, RUIN" appears exactly as quoted in the trial court's opinion. https://www.merriam-webster.com/dictionary/loss (last visited June 9, 2022). The remainder of the definition as quoted and relied on by the trial court ("the act of losing possession [and/or] DEPRIVATION") appears nowhere. ***Id.***

***4** We turn now to the judicial precedent on this question, of which there is none from the appellate courts of this Commonwealth. But many parties similarly situated to MacMiles have claimed coverage for loss of income during the Covid-19 pandemic and the resulting economic shutdown under insurance contracts substantially similar or identical to the Policy. Court decisions from across the country overwhelmingly and persuasively support a conclusion that MacMiles' loss of income claim is not covered.

First, and most fundamentally, we observe that MacMiles' claim arises under commercial property insurance coverage. Nearly all courts addressing this issue have held that economic loss unaccompanied by a physical alteration to the property does not trigger coverage under a commercial property insurance policy. For example, in ***Delaware Valley Mgmt., LLC v. Continental Cas. Co.***, 572 F.Supp.3d 119 (E.D. Pa. 2021), the plaintiff medical providers were prohibited to offer elective surgeries due to the Covid-19 pandemic. They alleged that their properties became contamination zones and that their ability to conduct business was significantly limited. ***Id.*** at *2. Plaintiffs argued, as MacMiles did here, that "physical loss of or damage to Covered Property" was reasonably susceptible of more than one meaning and therefore ambiguous. The District Court disagreed:

> Here, not only was there no physical alteration to the Covered Properties, but there was also no loss of utility of the buildings. Indeed, Plaintiffs admit that they "could remain open, but only for essential surgeries, not elective." (Am. Compl. at ¶ 77.) And Plaintiffs' loss of their ability to perform elective surgeries does not render the building "uninhabitable." Rather, their ability to conduct business was limited, which resulted in purely economic losses.

Id. at *5. Likewise, damage to property exists where there is "actual structural damage" or where damage "unnoticeable to the naked eye render[s] the property entirely useless and uninhabitable." ***Id.*** at *6. The ***Delaware Valley*** Court noted that the amount of insurance was tied to the period of physical restoration, and that the period of restoration portion of the policy made no sense unless the damage in question was physical damage. ***Id.*** at *7.

Similarly, the Third Circuit Court of Appeals, applying the law of New York and New Jersey, held that the presence of asbestos does not constitute "physical loss or damage" unless it is present in the air in quantities sufficient to render the building "uninhabitable and unusable." ***Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.***, 311 F.3d 226, 236 (3d Cir. 2002). In ***Port Authority***, the mere presence of asbestos in the insured building was not sufficient to trigger coverage:

> In the case before us, the policies cover "physical loss," as well as damage. When the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss. The structure continues to function—it has not lost its utility. The fact that the owner may choose to seal the asbestos or replace it with some other substance as part of routine maintenance does not bring the expense within first-party coverage.

Id. at 236. (Footnote omitted).

5** The Court of Common Pleas in ***Spector Gadon Rosen Vinci P.C. v. Valley Forge Ins. Co., 2021 Phila. Ct. Com. Pl. LEXIS 16 (June 16, 2021), reached the same conclusion.

There, the trial court found that the plaintiff law firm's loss of use of its office space pursuant to Governor Wolf's orders did not trigger coverage under a policy covering direct physical loss of or damage to its commercial property. Applying ***Port Authority***, the trial court found that physical damage to the insured property is necessary, especially in light of language in the policy contemplating a period of restoration during which physical repairs take place. ***Id.*** at *10.

Courts outside of Pennsylvania considering similar policy language have concluded that the loss of use of a business during the Covid-19 pandemic was not covered under policies insuring against physical loss of or damage to commercial property. In ***Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.***, 22 F.4th 450 (5th Cir. 2022) the Court held that the plaintiff's inability to provide dine-in services was an economic loss unrelated to the insured's property:

> TBB has failed to allege any tangible alteration or deprivation of its property. Nothing physical or tangible happened to TBB's restaurants at all. In fact, TBB had ownership of, access to, and ability to use all physical parts of its restaurants at all times. And importantly, the prohibition on dine-in services did nothing to physically deprive TBB of any property at its restaurants.

Id. at 456; ***see also***, ***Santo's Italian Café LLC v. Acuity Ins. Co.***, 15 F.4th 398, 402 (6th Cr. 2021) (noting that direct physical loss and direct physical damage are the "North Star of this property insurance policy from start to finish"); ***Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.,*** 499 F. Supp.3d 288 (S.D. Miss. 2020) (holding that insurance against physical loss of or damage to commercial property covers damage to the insured's building and personal property but not the operations). [4]

4 As noted in the main text, nearly all courts addressing commercial property insurance policies similar to the one at issue have found that a physical alteration to the subject property is necessary to trigger coverage. For representative federal cases, ***See, e.g.***, ***10012 Holdings, Inc. v. Sentinel Ins.***, 21 F.4th 216 (2d Cir. 2021); ***Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.***, 20 F.4th 303 (7th Cir. 2021); ***Sandy Point Dental, P.C. v. Cincinnati Ins. Co.***, 20 F.4th 327 (7th Cir. 2021); ***Oral Surgeons, P.C. v. Cincinnati Ins. Co.***, 2 F.4th 1141 (8th Cir. 2021); ***Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.***, 15 F. 4th 885 (9th Cir. 2021); ***Goodwill Indus. of Cent. Okla., Inc. v. Philadelphia Indemnity Insurance Company***, 21 F.4th 704 (10th Cir. 2021).
For representative state court cases, ***See, e.g.***, ***Inns by the Sea v. California Mut. Ins. Co.***, 71 Cal.App.5th 688, 286 Cal.Rptr.3d 576 (2021); ***Indiana Repertory Theatre v. Cincinnati Cas. Co.***, 180 N.E.3d 403 (Ind. Ct. App. 2022); ***Wakonda Club v. Selective Ins. Co. of Am.***, 973 N.W.2d 545 (Iowa 2022); ***Verveine Co. v. Strathmore Ins. Co.***, 489 Mass. 534, 184 N.E.3d 1266 (2022); ***Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co.***, —— N.W. ——, 2022 WL 301555 (Mich. Ct. App. Feb. 1, 2022); ***MAC Prop. Grp. v. Selective Fire and Cas. Ins. Co.***, 473 N.J.Super. 1, 278 A.3d 272 (N.J. App. Div. 2022); ***Nail Nook, Inc. v. Hiscox Ins. Co. Inc.***, 2021 -Ohio- 4211, 182 N.E.3d 356 (Ohio Ct. App.); ***Colectivo Coffee Roasters Inc. v. Society Ins.***, 401 Wis.2d 660, 974 N.W.2d 442 (2022).

Instantly, the trial court relied on ***In re Soc'y Ins. Co. Covid-19 Bus. Interruption Prot. Ins. Litig.***, 521 F.Supp.3d 729 (N.D. Ill. 2021). There, the Federal District Court found a factual issue as to whether the insured restaurant and hospitality businesses suffered a direct physical loss of their property as a result of the loss of in-person dining during the Covid-19 pandemic. The insureds argued that the presence of Covid-19 on their premises was physical damage that created the loss. ***Id.*** at 732. The District Court reasoned that the policy in question did not contain a virus exclusion. ***Id.*** at 735. Also, like the trial court instantly, the Northern District of Illinois relied on the disjunctive "or" in "direct physical loss of or damage to Covered Property" to support an interpretation of the policy language whereby physical loss meant something different from physical damage. ***Id.*** at 741.

6** In any event, the weight of authority is to the contrary and the Seventh Circuit implicitly overruled ***In re Soc'y, concluding that commercial property policies do not provide coverage for business interruptions due to Covid-19. ***Sandy Point Dental***, 20 F.4th 327 (7th Cir. 2021). Likewise, in ***Hair Studio 1208, LLC v. Hartford Underwriter's Ins. Co.***, 539

F.Supp.3d 409 (E.D. Pa. 2021), the Federal District Court cited ***Port Authority*** for the proposition that physical loss exists when a structure is "uninhabitable and unusable." ***Id.*** at 417. Pure economic loss is not property damage. ***Id.*** Said another way, policy language covering "direct physical loss or damage" unambiguously requires that the "claimed loss or damage must be physical in nature." ***Id.*** at 418 (quoting ***Philadelphia Parking Auth. v. Fed. Ins. Co.***, 385 F.Supp.2d 280, 289 (S.D.N.Y. 2005)). [5]

5 In ***Philadelphia Parking Auth.***, the Southern District of New York held that economic loss stemming from loss of business after the September 11, 2001 terrorist attacks was not covered.

Cases cited by Appellee and various amici do not refute this point. In ***Motorists Mut. Ins. Co. v. Hardinger***, 131 Fed. App'x 823, 826 (3d Cir. 2005), for example, the Third Circuit found a question of fact as to whether an e coli contamination of well water was a "physical loss" under a homeowner's policy. The family alleged they vacated the house because all of them experienced persistent illnesses and skin problems upon moving in. ***Id.*** at 824. Thus, the facts in ***Hardinger*** met the test set forth in ***Port Authority of New York***, wherein the Third Circuit wrote that invisible damage constitutes physical loss where it renders the building unusable or uninhabitable. 311 F.3d at 236 The same is true of cases where buildings became unusable due to the presence of gas or noxious fumes. ***See Essex Ins. Co. v. BloomSouth Flooring Corp.***, 562 F.3d 399 (1st Cir. 2009) (holding that the presence of an unexplained chemical odor sufficiently alleged a physical injury to the insured's building, thus triggering the insurer's duty to defend); ***TRAVCO Ins. Co. v. Ward***, 715 F.Supp.2d 699, 707 (E.D. Va. 2010) (holding that a noxious odor emitting from defective drywall constituted a direct physical loss), ***aff'd***, 504 Fed. App'x 251 (4th Cir. 2013) ***Western Fire Ins. Co. v. First Presbyterian Church***, 165 Colo. 34, 437 P.2d 52 (1968) (holding that the insured suffered a direct physical loss where gasoline accumulated in the soil under and around the insured's building and gasoline vapors rendered the building uninhabitable). In cases such as these, the condition that caused the loss, though not a visible physical alteration to the covered property, was physically present in the covered building. Instantly, in contrast, the prohibition on in-person dining had nothing to do with any condition, visible or invisible, at the Grant Street Tavern. Rather, the prohibition was meant to eliminate the possibility of infected patrons spreading an airborne illness to uninfected patrons. As MacMiles alleged: "The coronavirus causing COVID-19 is thought to spread mainly from person to person, primarily through respiratory droplets produced when an infected person coughs or sneezes." Complaint, 9/29/20, at ¶ 9. In previous cases wherein an airborne toxin or odor rendered covered property unusable, the toxin or odor was immanent in the property. It was not an airborne illness that people brought in with them. In a case involving the scope of property insurance coverage, this distinction is critical. [6]

6 Much has been made of the observation in Couch on Insurance that "physical alteration" is the most common coverage trigger for a policy insuring against "physical loss or damage" to covered property. COUCH ON INSURANCE, § 148:46 (3d ed. 2000). Because the analysis in § 148:46 neither relied on nor anticipated the present circumstances, we do not find it helpful. In our view, neither side of this debate advances its argument by citing or attacking the conclusions reached in § 148:46.

7** Ultimately, the question before us is not complicated. The provisions of the Policy at issue here cover commercial property. But MacMiles argues, and the trial court found, that "direct physical loss of **or** damage to Covered Property" covers pure economic loss caused by MacMiles' loss of use because of the disjunctive "or" between loss and damage. Policy, Commercial Property Coverage Part, Section I, Coverages/Insuring Agreement (emphasis added). That reading is reasonable if and only if "physical loss" means something distinct from a loss due to a physical alteration or destruction of the property. That is, we must conclude it is reasonable to read the Policy as covering mere loss of use even though the Policy never expressly says so; even though the policy repeatedly uses the word damage; and even though the amount of insurance provision references the time period necessary to "repair, replace, or rebuild" any part of the covered property that had been "damaged or destroyed." These latter terms make sense only in the context of partial physical damage to or total destruction of the covered property. They do not make sense in the context of a purely economic loss. ***See e.g., ***Dino Drop, Inc. v. Cincinnati Ins. Co.***, 544 F.Supp.3d 789, 798 (E.D. Mich. 2021) (holding that physical loss and damage "can only be reasonably be construed as extending to events that impact the physical premises completely (loss) or partially (damage)."). The trial court's reading of the Policy is strained, and we find that we are constrained to reject that holding.

Further, MacMiles has failed to allege any physical damage. Dine-in service was prohibited, but preparation of meals for takeout or delivery was permitted. Thus, MacMiles' building was not rendered unusable or uninhabitable. And Covid-19, a primarily airborne illness, did no physical damage to MacMiles' covered property. In-person dining was prohibited to prevent infected diners from spreading the virus to others, not because any condition immanent in the Grant Street Tavern rendered the building unusable by diners.

Ultimately, our analysis, aided by persuasive authority from numerous other federal and state jurisdictions, leads us to conclude the trial court erred in finding that MacMiles established a valid claim for coverage under the business income provisions of the Policy. We will therefore reverse the trial court's order granting summary judgment insofar as it granted summary judgment in favor of MacMiles on this issue. Because the pertinent facts are undisputed and the question before us is purely one of law, we direct the trial court to enter an order granting judgment on the pleadings in favor of Erie on this issue.

Next, we consider whether a material issue of fact exists under the civil authority provision of the Policy. Civil Authority coverage is listed under the "Additional Coverages" section of the Policy. It reads in pertinent part as follows:

1. Civil Authority

When a peril insured against causes damage to property other than property at the premises described in the "Declarations", we will pay for the actual loss of "income" and/or "rental income" you sustain and necessary "extra expense" caused by action of civil authority that prohibits access to the premises described in the "Declarations" provided that both of the following apply:

a. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the premises described in the "Declarations" are within that area but are not more than one mile from the damaged property; and

b. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the peril insured against that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Policy, Commercial Property Coverage Part, Section I, Income Protection – Coverage 3, ¶ C1.

The trial court concluded that, under the civil authority provision, mere loss of use of a nearby property is not covered. Given that the Civil Authority provision expressly requires damage to a property other than the insured property, a showing of physical damage is required. The trial court found that a question of fact existed as to whether the Covid-19 virus was physically present at a nearby property and that its presence constituted covered physical damage. MacMiles also would have to show that the applicable governor's orders were taken in response to dangerous physical conditions resulting from damage to a nearby property. Trial Court Opinion, 5/25/21, at 18-19. The trial court therefore denied the competing motions on this issue.

8** Upon review, we conclude that the trial court erred in finding a triable issue of fact. As discussed above, where the alleged property damage is invisible (as is the possible presence of Covid-19 on surfaces), it does not qualify as physical damage for purposes of a commercial property insurance policy. The ***Delaware Valley Court allowed for a possible exception to this rule where the invisible damage renders a building unusable or uninhabitable, but MacMiles has not alleged that any business within a mile of its premises was rendered unusable or uninhabitable by the presence of Covid-19. Thus, the threshold damage requirement is not met, and MacMiles cannot recover under the civil authority provision of the Policy. The trial court erred in denying Erie's motion for judgment on the pleadings on this issue.

In its second question presented Erie challenges the trial court's finding that the Policy's governmental authority exclusion was inapplicable. Because we have concluded that MacMiles has failed to establish the existence of coverage, we need not assess the applicability of any exclusion.

For the foregoing reasons, we conclude the trial court erred in granting partial summary judgment in favor of MacMiles and in denying Erie's motion for judgment on the pleadings. On the undisputed facts before us, Erie is entitled to judgment on the pleadings in its favor on the coverage issues.

Order reversed. Jurisdiction relinquished.

President Judge Emeritus Bender, Judge Bowes, Judge McLaughlin, and Judge King join the opinion.

Judge Lazarus, Judge Kunselman, and Judge Nichols concur in the result.

President Judge Panella files a concurring statement in which Judge Lazarus, Judge Kunselman, and Judge Nichols join.

CONCURRING STATEMENT BY PANELLA, P.J.:
I respectfully concur with the result reached by the majority although I do not join in the opinion. I reach this conclusion, which is different from the relief I grant in the related case, ***Ungarean et al. v. CNA et al.,*** —— A.3d —— (Pa. Super. 2022), because these cases, in which the Court must address coverage issues, are fact intensive matters which require, in each case, a review of the individual policy. We must base our decision solely on the policy's language. Therefore, I write separately to highlight that our review of MacMiles's claims is restricted to the "specific terms employed" in Erie's policy. ***See Harleysville Ins. Cos. v. Aetna Cas. & Sur. Ins. Co.,*** 568 Pa. 255, 795 A.2d 383, 387 (2002).

Judges Lazarus, Kunselman, and Nichols join this concurring statement.

All Citations

--- A.3d ----, 2022 WL 17332910, 2022 PA Super 203

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EXHIBIT D

2022 WL 17721040
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

PHILADELPHIA EAGLES LIMITED PARTNERSHIP, Plaintiff,
v.
FACTORY MUTUAL INSURANCE COMPANY Defendant.
SPF OWNER LLC and PHILADELPHIA 76ERS, L.P., Plaintiffs,
v.
HARTFORD FIRE INSURANCE COMPANY Defendant.

CIVIL ACTION NO. 21-1776,
CIVIL ACTION NO. 22-1333
|
Filed 12/15/2022

MEMORANDUM RE: DEFENDANTS' MOTIONS TO DISMISS

Baylson, J.

***1** Prior to the Covid 19 Pandemic, the Philadelphia Eagles football team purchased a $1 Billion insurance policy for coverage of certain risks relating to "physical loss or damage of property." In 2022, after suffering a large loss of revenue, which the Eagles allege was due to COVID-19, the Eagles sought payment from its insurer, Defendant Factory Mutual Insurance Company ("FM"), which denied coverage. The Eagles then instituted suit in state court, which FM removed to this Court, following which FM filed a Rule 12(b)(6) Motion to Dismiss, contending that its policy did not "cover" the Eagles' losses.

Similarly, the Philadelphia 76ers basketball team and SPF Owner LLC (the "76ers Plaintiffs") purchased a comparable policy, but with different coverage terms, from Defendant Hartford Fire Insurance Company ("Hartford"). After the 76ers Plaintiffs incurred losses which they allege were due to COVID-19, Hartford denied coverage. The 76ers Plaintiffs filed suit in state court. Hartford removed the case to this Court and also filed a Rule 12(b)(6) Motion, with arguments similar to those FM made in the Eagles case.

Although these are separate cases, with separate policy language, they present similar legal and procedural issues. Several status conferences have been held with counsel, at which the Court noted the various arguments presented in the Rule 12 Motions, but stated any decision on the merits would be delayed pending a Pennsylvania Supreme Court decision or a precedential Third Circuit decision issued under Pennsylvania Law on the coverage issues, which this Court would be bound to follow.

At a prior status conference, the Court allowed the parties to serve initial written discovery but stayed any obligation to respond. This legal landscape changed as of November 30, 2022, when the Superior Court of Pennsylvania issued two en banc Opinions on insurance coverage of COVID-19 losses, which are discussed in detail below.

This Court is faced with the fact that a number of judges on the Pennsylvania Superior Court have concluded that exclusionary clauses in both policies in those cases (similar but not identical to the policies at issue in the Eagles and 76ers cases) do not prevent coverage and have issued two opinions, although not binding on this Court, that are worthy of consideration and warrant this Court to wait additional time to render a decision on the pending Rule 12 Motions. However, for reasons stated below, the Court will allow limited discovery to commence.

I. CASE HISTORY AND SUMMARY OF THE BRIEFS

A. Summary of Alleged Facts

As alleged by the Plaintiffs, the events giving rise to this case are as follows. Plaintiffs were required to close or restrict access to their insured properties due to the COVID-19 pandemic for several months, resulting in substantial financial loss. Eagles' Am. Compl. ¶ 5; 76ers' Compl. (21-1333 ECF 1-1) ¶¶ 1, 10-12, 15. Plaintiffs claim that COVID-19 viral droplets expelled from infected individuals could have been present in the air on the properties, and landed on, attached, and adhered to surfaces, thereby physically changing the airspace and surfaces of the properties. Eagles' Am. Compl. ¶ 129; 76ers' Compl. ¶¶ 12, 14. The properties therefore "could not fulfill [their] essential purpose and function[.]" Eagles' Am. Compl. ¶ 27; see also 76ers' Compl. ¶¶ 12-14.

***2** The Eagles claim they are entitled to coverage under two distinct coverages:

(1) for property loss under the " 'Time Element' (business interruption) loss, and Extra Expenses resulting from the 'risks' associated with the Pandemic" and

(2) for "specified amounts incurred ... under the "Communicable Disease Response" and "Interruption by Communicable Disease" coverages. Eagles' Am. Compl. ¶ 7.

The 76ers' properties were insured by Hartford under four similarly-worded policies issued from October 2019 to October 2021 (all together, the "76ers' Policies"). 76ers' Compl. ¶¶ 7-8. The 76ers Plaintiffs seek coverage for their loss of business income due to the "physical loss of or physical damage to" the 76ers' properties. Id. at ¶ 18.

Hartford denied coverage, relying on a term that excluded coverage for the presence of viruses. Id. at ¶ 123. FM contended that the terms of the Eagles' Policy limited coverage to the $1 million "Communicable Disease Response" (which has been paid). Eagles' Am. Compl. ¶ 8, 9; Hearing Transcript (21-1776 ECF 71) at 7:18-25. FM asserts there was no duty to pay for the "physical loss or damage to property and business interruption" because of an exclusion for losses caused by "contamination." Eagles' Am. Compl. ¶¶ 8, 9.

B. Procedural History and Briefing of Philadelphia Eagles v. Factory Mut. Ins. Co.

The Eagles assert two claims: **Declaratory Judgment** of the Eagles' rights and the obligations of FM under the contractual agreement to provide coverage for the Eagles' losses (Eagles' Am. Compl. ¶ 220) and **Declaratory Judgment** estopping FM from asserting that the Policy does not afford coverage for the Eagles' losses under the regulatory estoppel doctrine (Id. at ¶ 230).

FM argues that the Eagles have failed to plead facts that could establish "physical loss or damage" because there was no "tangible destruction" of any part of the property, and loss of use can only trigger coverage if it is "tied to a physical condition actually impacting the property." FM Mot. (21-1776 ECF 48) at 1, 10, 17. Second, FM argues that even if there were physical loss or damage, the Contamination Exclusion expressly excludes coverage resulting from a "virus" or a "disease causing or illness causing agent." Id. at 1, 21-27. Instead, coverage for Communicable Diseases is limited to $1 million in additional coverage. Id. at 8-9, 24-25. FM also argues that the "Loss of Use" and "Law or Ordinance" Exclusions bar the Eagles from recovering loss caused by governmental orders issued in response to the pandemic. Id. at 1-2, 17-19, 27-30. Last, FM argues that the estoppel claim fails because their position is consistent with prior statements about the Communicable Disease coverage, and that the Contamination Exclusion is valid despite being worded differently from other virus exclusions found in different contracts. Id. at 26-27, 30-32.

The Eagles responded, arguing that the Eagles' Policy coverage extends to losses resulting from the risks of direct physical loss or damage to the Eagles' property, and that "physical loss" should be considered a separate term with an independent meaning from "physical damage." Eagles' Resp. (21-1776 ECF 50) at 10-11. As such, limitations on the use of the property due to threat of contamination would trigger coverage. Id. at 9, 11. The Eagles argue that "imminent" threat or risk of physical impact is sufficient to show physical loss. Id. at 3, 25, 29-33. At a minimum, the Eagles argue that questions about the threat or prevalence of the virus at the Eagles' property and the intended meaning of the Eagles' Policy require discovery. Id. at 12, 17. The Eagles argue that the Contamination Exclusion conflicts with the Communicable Disease Coverage, and so must be interpreted to allow full coverage for Communicable Diseases. Id. at 36-38. Finally, the Eagles argue that FM is estopped from relying on the Contamination Exclusion because of prior statements made to regulators and that the Contamination Exclusion is limited to "hazardous materials." Id. at 42-44.

***3** FM argues that the Eagles invent ambiguity that is not present in the policy. FM Reply (21-1776 ECF 52) at 1. It argues that loss of use does not constitute physical loss because the latter requires a change to some physical condition of the property. Id. at 1-4.

C. Procedural History and Briefing of SPF Owner and Philadelphia 76ers v. Hartford Fire Ins. Co.

The 76ers Plaintiffs assert one claim: **Declaratory Judgment** that Hartford had a duty to pay for Plaintiffs' losses caused by COVID-19. 76ers Compl. ¶¶ 132-139. Hartford filed a Motion to Dismiss, arguing that the "Virus Exclusion" bars coverage of the 76ers Plaintiffs' claims, stating that Hartford "will not pay for loss or damage caused directly or indirectly by" the "[p]resence, growth, proliferation, spread, or any activity of ... virus." HF Mot. (22-1333 ECF 6) at 10-11. Second, Hartford argues that the 76ers Plaintiffs fail to allege any facts that would establish "physical loss of or physical

damage to" the insured property. Id. at 17-18. It argues that economic loss is not the same as physical damage, and that the properties were useable. Id. at 17-22. Last, it argues that the 76ers Plaintiffs have not alleged facts necessary to trigger the other coverage claimed. Id. at 24-30.

The 76ers Plaintiffs argue that Third Circuit case law supports interpreting "physical loss" to trigger when a property is no longer usable or functional. 76ers Resp. (22-1333 ECF 12) at 1, 13. The 76ers Plaintiffs argue that physical loss exists where the property's use is reduced "to a substantial degree." Id. at 8, 18. The 76ers Plaintiffs also argue that the Virus Exclusion only applies to "wood diseases," not human diseases, and that it is ambiguous, regardless. Id. at 21-23.

Hartford replied, arguing that the 76ers Plaintiffs' "wood disease" argument ignores the unambiguous meaning of the word "virus." HF Reply (22-1333 ECF 19) at 2-4. Hartford reemphasizes that the 76ers Plaintiffs fail to allege any direct physical loss or physical damage, and that preventative measures do not constitute damage. Id. at 6-10. Hartford argues that the vast weight of authority disfavors the 76ers Plaintiffs on all points. Id. at 5, 7, 11-12.

II. POLICY LANGUAGE

A. Eagles' Policy Language

The terms of the Eagles' Policy (Eagles' Policy (21-1776 ECF 44-1)) are addressed in full below. The Eagles' Policy is divided into five sections: Declarations, Property Damages, Time Element, Loss Adjustment and Settlement, and General Provisions. Eagles' Policy at Table of Contents 1-3. The first line of the Declarations section of the Eagles' Policy states that the Policy "covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as herein excluded, while located as described in this Policy." Id. at 1 (emphasis included). That language is not defined and is not included in the Property Damage section of the Eagles' Policy. Under the Property Damage section of the Eagles' Policy, the Eagles' Policy excludes "indirect or remote loss or damage," "interruption of business, except to the extent provided by this Policy" (the "Loss of Use Exclusion"), "loss or damage or deterioration arising from any delay," and "loss from enforcement of any law or ordinance" (the "Law or Ordinance Exclusion"), among other exclusions. Id. at 10, Section 3.A.1, 2, 4, 6. Additionally, the Eagles' Policy's Physical Damage section contains the following exclusion ("the Contamination Exclusion"):

> ***4** This Policy excludes the following unless directly resulting from other physical damage not excluded by this Policy:
>
> 1) **contamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination** due only to the actual not suspected presence of **contaminant(s)** directly results from other physical damage not excluded by this Policy, then only physical damage caused by such **contamination** may be insured. This exclusion ... does not apply to radioactive contamination which is excluded elsewhere in this Policy.

Id. at 13, Section 3.D.1 (emphasis original). Under the General Provisions section, "contaminant" is defined as "anything that causes contamination." Id. at 62, Section 13. "Contamination" is defined as:

> [A]ny condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold, or mildew.

Id. Under the "Additional Coverages" section of the Physical Damage section, the Eagles' Policy addresses coverage for "Communicable Disease Response," as follows:

> If a **location** owned, leased or rented by the Insured has the actual not suspected presence of **communicable disease** and access to such **location** is limited, restricted or prohibited by:
>
> 1) an order of an authorized governmental agency regulating the actual not suspected presence of **communicable disease**; or
>
> 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of **communicable disease**,
>
> this Policy covers the reasonable and necessary costs incurred by the Insured at such **location** with the actual not suspected presence of **communicable disease** for the:

1) cleanup, removal and disposal of the actual not suspected presence of **communicable diseases** from insured property; and

2) actual costs of fees payable to public relations services or actual costs of using the Insured's employees for reputation management resulting from the actual not suspected presence of **communicable diseases** on insured property.

This Additional Coverage will apply when access to such **location** is limited, restricted or prohibited in excess of 48 hours.

This Additional Coverage does not cover any costs incurred due to any law or ordinance with which the Insured was legally obligated to comply prior to the actual not suspected presence of **communicable disease**.

Id. at 21, Section F (emphasis original). "Communicable disease" is defined under the General Provisions section as "disease which is: (A) transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges, or (B) Legionellosis." Id. at 62, Section 13.

The Eagles' Policy also covers Time Element loss "directly resulting from physical loss or damage of the type insured ... to property described elsewhere in this Policy and not otherwise excluded by this policy[.]" Id. at 33, Section 1.A.1. Time Element coverage can be calculated based on either gross earnings, or gross profit. Id. at 34, Section 2. The Time Element period of liability is:

***5** For building and equipment, the period

a) starting from the time of physical loss or damage of the type insured; and

b) ending when with due diligence and dispatch the building and equipment could be: (i) repaired or replaced; and (ii) made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage.

Id. at 40, Section 3.A. However, the Time Element policy does not insure:

Any loss during any idle period, including but not limited to when production, operation, service or delivery or receipt of goods would cease, or would not have taken place or would have been prevented due to:

1) physical loss or damage not insured by this Policy on or off of the insured location[, or]

4) any other reason other than physical loss or damage insured under this Policy.

Id. at 43, Section 4.A. The Time Element section also contains an Interruption by Communicable Disease Additional Time Element Coverage Extension. Id. at 51-52, Section E.

If a **location** owned, leased or rented by the Insured has the actual not suspected presence of **communicable disease** and access to such location is limited, restricted or prohibited by:

1) an order of an authorized governmental agency regulating the actual not suspected presence of **communicable disease**; or

2) a decision of an Officer of the Insured as a result of the actual not suspected presence of **communicable disease**,

this Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY at such **location** with the actual not suspected presence of **communicable disease**.

This Extension will apply when access to such **location** is limited, restricted, or prohibited in excess of 48 hours.

INTERRUPTION BY COMMUNICABLE DISEASE Exclusions: As respects INTERRUPTION BY COMMUNICABLE DISEASE, the following additional exclusion applies:

This Policy does not insure loss resulting from:

1) the enforcement of any law or ordinance with which the Insured was legally obligated to comply prior to the time of the actual spread of **communicable disease**.

Id. (emphasis original).

B. 76ers Policies' Language

There are four related policies at issue in the 76ers' matter, but all include the same language. For brevity, citations are only provided to the 2019 SPF Policy. All Policies provide:

> [Hartford] will pay for direct physical loss of or direct physical damage to

> [the Properties] caused by or resulting from a Covered Cause of Loss.

See e.g. 2019 SPF Policy, 22-1333 ECF 1-1 Dkt. at 117. Despite that language appearing throughout the 76ers Policies and in nearly all relevant sections, the terms "physical," "loss," "physical loss," "damage," and "physical loss of or damage to" are not defined. A Covered Cause of Loss is defined as:

> [D]irect physical loss or direct physical damage that occurs during the Policy Period and in the Coverage Territory unless the loss or damage is excluded or limited in this policy.

Id. at 130.

All the coverages that the 76ers Plaintiffs seek use the same language regarding "direct physical loss" or "direct physical damage." The relevant policy terms are:

> ***6 Business Income and Extra Expense Coverage**. Hartford "will pay ... for the actual loss of Business Income [76ers Plaintiffs] sustain and the actual, necessary and reasonable Extra Expense [76ers Plaintiffs] incur due to the necessary interruption of [their] business operations during the Period of Restoration due to direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss at 'Scheduled Premises' ...." Id. at 123.
>
> **"Extra Expense"**: "the actual, necessary and reasonable expenses [76ers Plaintiffs] incur during the Period of Restoration that [76ers Plaintiffs] would not have incurred if there had been no direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss at 'Scheduled Premises'." Id. at 123.
>
> **Dependent Properties Coverage**. Hartford "will pay for the actual loss of Business Income [76ers Plaintiffs] sustain and the actual, necessary and reasonable Extra Expense [76ers Plaintiffs] incur due to the necessary suspension of [their] operations during the Period of Restoration," but only if the suspension is "caused by direct physical loss of or direct physical damage to a Dependent Property caused by or resulting from a Covered Cause of Loss." Id. at 110.
>
> **Accounts Receivable Coverage**. Hartford "will pay for direct physical loss or direct physical damage caused by or resulting from a Covered Cause of Loss to [76ers Plaintiffs'] records of Accounts Receivable," i.e., "amounts due from [76ers Plaintiffs'] customers that [76ers Plaintiffs] are unable to collect; due to a covered direct physical loss or covered direct physical damage to inscribed, printed, written or electronic records of accounts receivable," as well as interest on loans, collection expenses and other reasonable expenses. Id. at 80.

The "period of restoration" begins when the Covered Cause of Loss occurs and ends when the property is "repaired, rebuilt or replaced with reasonable speed and similar quality" or "when business is resumed at a new permanent location." Id. at 124 (2019 SPF Policy).

Coverages for Civil Authority and Ingress or Egress also require a showing of direct physical loss or damage. Both coverages require, among other things, a Covered Cause of Loss. Id. at 130. Civil Authority coverage applies "when access to [76ers Plaintiffs'] 'Scheduled Premises' is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of [the] 'Scheduled Premises'." Id. at 109. Ingress or Egress coverage applies "when ingress or egress to [76ers Plaintiffs'] 'Scheduled Premises' " is prohibited or limited as the "direct result of a Covered Cause of Loss to property at premises that is contiguous to [the] 'Scheduled Premises'." Id. at 112, 92.

The 76ers' Policies include exclusions, including one that excludes coverage for damage caused directly or indirectly by viruses (the "Virus Exclusion").

> [Hartford] will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage.
>
> [...]
>
> **"Fungus", Wet Rot, Dry Rot, Bacteria or Virus**[:] Presence, growth, proliferation, spread, or any activity of "fungus," wet rot, dry rot, bacteria or virus.
>
> [...]

> [This exclusion] appl[ies] whether or not the loss event results in widespread damage or affects a substantial area.

***7** Id. at 130-131, 133.

III. STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court accepts all factual allegations as true and views them in a light most favorable to the plaintiff. Doe v. Univ. of the Scis., 961 F.3d 203, 208 (3d Cir. 2020). To survive this motion, a plaintiff must include sufficient facts in the complaint that, accepted as true, "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A complaint is insufficient if it suggests only the "mere possibility of misconduct" or is a "[t]hreadbare recital[ ] of the elements of a cause of action, supported by mere conclusory statements." Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (citing Twombly, 550 U.S. at 555). To survive the motion, a plaintiff must "plead 'sufficient factual matter to show that the claim is facially plausible,' thus enabling 'the court to draw the reasonable inference that the defendant is liable for misconduct alleged.' " Warren Gen. Hosp. v. Amgen, Inc., 643 F.3d 77, 84 (3d Cir. 2011) (quoting Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir.2009)).

IV. ANALYSIS OF THIRD CIRCUIT AND PENNSYLVANIA CASE LAW

As a preliminary matter, a court must construe the language of an insurance policy "in its plain and ordinary sense," and where "the language of an insurance policy is plain and unambiguous, a court is bound by that language." Pennsylvania Nat'l Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 14 (Pa. 2014). "Coverage clauses are interpreted broadly so as to afford the greatest possible protection to the insured," whereas exclusions are "interpreted narrowly against the insurer." Westport Ins. Corp. v. Bayer, 284 F.3d 489, 498 n.7 (3d Cir. 2002) (internal quotation omitted).

A. Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.

The Third Circuit has addressed the question of whether "sources unnoticeable to the naked eye" can cause physical loss or damage to a property severe enough to trigger insurance coverage for "physical loss or damage." Port Authority of New York and New Jersey v. Affiliated FM Ins. Co., 311 F.3d 226, 235-36 (3d Cir. 2002). The Third Circuit examined whether the presence of asbestos in a building could be considered "physical loss or damage." Id. at 230. The insured argued that asbestos located in the insured property could deteriorate to the point that it could disperse into the air and lead to an increased risk to human health. Id. at 230-31. The District Court, applying New York and New Jersey law, determined that " 'physical loss or damage' could be found only if an imminent threat of asbestos release existed, or actual release of asbestos resulted in contamination of the property so as to nearly eliminate or destroy its function, or render it uninhabitable. The mere presence of asbestos ... was not enough to trigger coverage." Id. at 232.

After noting that "all risks" does not mean "every risk" (id. at 234), the Third Circuit determined "[p]hysical damage to a building as an entity by sources unnoticeable to the naked eye must meet a higher threshold" than visual damage to trigger coverage for "physical loss or damage." Id. at 235-36. Because the policy in question included "physical loss" as well as "physical damage," the Third Circuit ruled that large quantities of a dangerous particle could constitute a distinct loss to the owner if the quantity "is such as to make the structure uninhabitable and unusable[.]" Id. at 236. However, if the dangerous particle is merely "present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss." Id. The Third Circuit adopted the District Court's standard that "physical loss or damage" requires "contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of [the substance] that would cause such loss of utility." Id. Absent evidence of such a threat of or actual loss of function, mere presence of the substance or "the general threat of its future release it not enough ... to trigger coverage" under a "physical loss or damage" policy. Id.

***8** The facts addressed by the Third Circuit in Port Authority make no reference to any exclusions.

B. Motorists Mut. Ins. Co. v. Hardinger

The Third Circuit later affirmed the standard of Port Authority, this time applying Pennsylvania law. 131 Fed. Appx. 823 (3d Cir. 2005). In Motorists Mut., the Third Circuit addressed a question of whether e-coli in a house's well water, resulting in infections and respiratory, viral, and skin conditions, entitled the homeowners to coverage for physical loss or damage. Id. at 824-25. The Third Circuit, citing Port Authority, disagreed with the lower court's decision that the e-coli contamination was merely a "constructive loss" rather

than a "physical loss." Id. at 825-827. Instead, the Third Circuit ruled that there was a genuine issue of triable fact as to whether the property was made useless or uninhabitable. Id. at 826-27.

The policy in question did have a "pollution" exclusion, which the insurance company claimed applied to the e-coli contamination. Id. at 824. The Third Circuit did not address this argument but remanded the issue for the District Court's consideration. Id. at 825.

C. MacMiles, LLC d/b/a Grant St. Tavern v. Erie Ins. Exchange

The Pennsylvania Superior Court has recently determined that "physical loss or damage" requires some kind of physical alteration. 2022 Pa. Super. 203 (2022) (en banc) (slip op.) at 9-14. The lower court had granted the insured's motion for summary judgment and denied the insurer's motion for judgment on the pleadings. Id. at 1. The insured argued that the economic losses they suffered due to disruptions caused by COVID-19, resulting in the loss of use of their business premises, were covered under their commercial business property policy, which covered "income protection" resulting from "direct physical 'loss' of or damage to Covered Property." Id. at 1, 5-6. The Superior Court ruled that "mere loss of use of commercial property unaccompanied by physical alteration or other condition immanent in the property that renders the property itself unusable or inhabitable" is not covered by the insurance policy. Id. at 2. The Pennsylvania Superior Court cited both Port Authority and Motorists Mut. in support of its ruling. Id. at 10, 13-14.

The lower court had determined that "physical loss" and "physical damage" were two distinct terms, and so the term "physical loss" did not necessarily require physical or structural damage. Id. at 7. It emphasized that the social distancing orders resulted in physical limitations on the use of the property. Id. However, the Pennsylvania Superior Court was not convinced, observing that "[n]early all courts addressing this issue have held that economic loss unaccompanied by a physical alteration to the property does not trigger coverage[.]" Id. at 8-9. Despite a handful of cases finding for insured parties, the Superior Court noted that "the weight of authority" is in favor of insurers. Id. at 13.

The Superior Court determined that one factor separating rulings in favor of the insured as opposed to rulings in favor of the insurer was that, where the insured were successful, they had been able to show that "the condition that caused the loss, though not a visible physical alteration to the covered property, was physically present in the covered building." Id. at 14. Unlike in cases like Motorists Mut., where e-coli was physically present on the premises, the plaintiffs in MacMiles were subjected only to a prohibition on in-person dining – there was no evidence that COVID-19 was actually present in the insured property, but was instead "brought in" by patrons. Id. at 15.

***9** The Superior Court ruled that, while it is reasonable to read "physical loss" as having a distinct meaning from "physical alteration or destruction," the term "physical loss" only makes sense "in the context of partial physical damage or total destruction of the covered property," not "in the context of purely economic loss." Id. at 15-16. The insured had failed to allege any physical damage and had acknowledged that preparation of meals was still permitted. Id. at 16. Thus, the building had not been rendered unusable. Id.

The Pennsylvania Superior Court also addressed the insured's argument that their loss should be covered under the Civil Authority clause. Id. at 17. It again determined that the mere presence of COVID-19 at the property could not establish coverage without a showing that a property was rendered unusable or uninhabitable. Id. at 18. The Pennsylvania Superior Court did not discuss any exclusion that could apply to viruses. Id. at 19.

D. Ungarean v. CAN and Valley Forge Ins. Co.

On the same day it decided MacMiles, the Pennsylvania Superior Court reiterated its determination that the terms "physical loss" and "physical damage" had separate meanings, but unlike its decision in MacMiles, it ruled that "physical loss" could include deprivation from use of the insured property. Ungarean v. CNA and Valley Forge Ins. Co., 2022 Pa. Super. 204 (2022) (en banc) (slip op.) at 11. As in MacMiles, the insured alleged significant losses when COVID-19 interrupted its business and claimed that the insurer should cover the losses due to the "direct physical loss" of the insurer's dental practice. Id. at 2. The lower court had found that Ungarean was entitled to coverage under the Business Income and Extra Expense provisions, which provided coverage for suspension of operations resulting from "direct physical loss of or damage to property." Id. at 6-7.

The Superior Court noted that "Ungarean's interpretation of an ambiguous contract need only be reasonable to be controlling," and that Ungarean's contention that "direct

physical loss" should mean something different from "direct physical damage," was reasonable and properly adopted by the lower court. Id. at 8-9. Citing the lower court at length, the Pennsylvania Superior Court affirmed that "loss" could include "loss of use of property absent any harm to the property" or "the act of being deprived of the physical use of one's property." Id. at 9-10. It also agreed with the lower court's reasoning that COVID-19 had a close logical and consequential relationship with the way Ungarean could use his property and physical space, and so the lower court's interpretation did not write the word "physical" out of the contract. Id. at 10-11. The insured's "loss of the use of his [property] due to COVID-19 and the governmental orders equated a direct physical loss of his property." Id. at 11. The Superior Court noted in dicta that another way the insured could show direct physical loss or damage would be to show "the actual presence of COVID-19" such that the property became "uninhabitable or unusable." Id at 11 n.3. However, Ungarean did not allege that COVID-19 was actually present in his property. Id.

As Hartford (HF Mot. at 20), the insurer in Ungarean argued that the Period of Restoration clause required repairs, thereby implying some physical alteration had to occur to trigger coverage. Id. at 12. The Superior Court agreed with the lower court's determination that Periods of Restoration are "time limits" and do not alter the definition of "physical loss or damage." Id. Addressing a series of exclusions on which the insurer relied, including a Contamination Exclusion, the Superior Court held that that exclusion did not apply to the insured's claim, largely because it was not in the proper category that applied to Business Income and Extra Expense coverage, raising ambiguity that had to be resolved in favor of the insured. Id. at 2, 14-18. Additionally, because Ungarean had not alleged that COVID-19 was actually present, the Contamination Exclusion did not apply. Id. at 20. The Superior Court ruled that the exclusion for "fungi, wet rot, dry rot, and microbes" did not mention "virus" in any definition, and so did not apply. Id. at 14, 21. Also, the court ruled that, because the Ordinance or Law Exclusion specifically related to structural integrity, it did not apply to the facts at issue. Id. at 22.

***10** Judge Stabile of the Pennsylvania Superior Court, who wrote the majority opinion in MacMiles, wrote a lengthy dissent, arguing that the Ungarean majority "endorse[d] a strained construct of the Policy[.]" Id. at 2 (dissent, J. Stabile). The dissent pointed to the "almost unanimous majority of jurisdictions to have addressed this issue" ruling that a policy "does not cover mere *loss of use* of commercial property unaccompanied by physical alteration or other condition in the property that renders the property itself unusable or uninhabitable." Id. at 3 (dissent, J. Stabile) (emphasis original). "[E]conomic loss, unaccompanied by a physical alteration to the property does not trigger coverage[,] ... a result that is overwhelmingly and persuasively supported by decisions from across the country." Id. at 9 (dissent, J. Stabile). The dissent would have applied the Third Circuit's reasoning in Port Authority and Motorists Mut. requiring that the building be rendered "uninhabitable and unusable." Id. at 10, 13 (dissent J. Stabile). The dissent would have denied the insured relief because the insured did not allege that COVID-19 caused any physical alteration to the building, but was merely limited as to the number of patients coming into the building. Id. at 15 (dissent, J. Stabile).

V. CONCLUSION

Given the recent en banc decisions of the Pennsylvania Superior Court, some observers may perceive inconsistencies in reaching contrary coverage decisions in the two cases discussed above. One distinguishing point is that, unlike the insured in MacMiles who the court determined had not properly alleged physical damage, all Plaintiffs in the Eagles and 76ers case have alleged physical damage to their Properties due to the presence of COVID-19 on the surfaces and in the air of the Properties. Eagles' Am. Compl. ¶ 5; 76ers' Compl. ¶¶ 11-12. However, the Ungarean decision suggests that omission is not fatal to an insured's position. Ungarean, 2022 Pa. Super. 204 (slip op.) at 11 n.3. The concurrence by Judge Panella in MacMiles emphasized that the difference between the outcomes of MacMiles and Ungarean was "because these cases ... are fact intensive matters which require, in each case, a review of the individual policy." MacMiles, 2022 Pa. Super. 203 (slip op.) at 1 (concurrence, J. Panella). The concurrence did not identify what language resulted in the different outcome.

Additionally, the Defendant Insurers took the position in state court that there were exclusionary clauses which required ruling as a matter of law that there was no coverage for the alleged COVID-19 damages. Those arguments have been repeated by the insurers in these cases. Given this Court's preference to delay decisions on this issue, as of this time, it is therefore appropriate to allow Plaintiffs to initiate limited discovery without ruling on the Motions to Dismiss. Although this may seem unusual, the issues raised by the parties may require discovery and because facts can be forgotten or mistaken, and human recollection is not infinite, this

Court believes that it would be fair to allow the Plaintiffs to commence limited discovery to at least get some "beachhead" of facts in the possession of the Defendants that may be informative if it is eventually held, under authoritative court decision and based on Pennsylvania Law, that either of these policies have some ambiguity or that any of the other Plaintiffs' theories are allowed to proceed. Fairness to the Plaintiffs without undue prejudice to the Defendants, warrants discovery.

Counsel have advised that a similar case is pending before the Third Circuit which may itself decide to wait for the Pennsylvania Supreme Court to make a decision. Indeed, the Third Circuit may certify the issue to the Pennsylvania Supreme Court. See Third Circuit Local Appellate Rule Misc. 110 and Internal Operating Procedure 10.9. There is no certainty that the two Superior Court cases will result in any prompt decision by the Pennsylvania Supreme Court. In the first place, those cases could be settled by the parties. Even if there is no settlement and a petition for allocator is filed, the Pennsylvania Supreme Court will first decide whether to grant allocator and then, if so, there will certainly be a period of time for briefing, presumably to be followed by oral argument – and some time can pass before the Pennsylvania Supreme Court will have rendered a definitive decision.

***11** At the conclusion of the argument held on December 7, 2022, the Court instructed counsel to meet and confer about an initial discovery program and to submit either a joint proposal or separate proposals to this Court. These documents have now been filed. Eagles' Joint Status Report (21-1776 ECF 70); 76ers' Status Report (22-1333 ECF 31); H.F. Status Report (22-1333 ECF 32).

After both parties submitted proposals to initiate limited discovery, the Court has determined that at this time discovery should be limited to exchange of documents by both parties. The Eagles and FM have requested additional time. The 76ers and Hartford have very different views of what discovery should take place.

The Court has determined that both parties must preserve documents, including Electronically Stored Information ("ESI"). A period of time will be allowed for further meet and confer. An appropriate order follows.

All Citations

Slip Copy, 2022 WL 17721040

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EXHIBIT E

RULING

RE: First Circuit Court, State of Hawai‘i

RE: Hawaii Theatre Center v. American Insurance Co.,
Civ. No. 1CCV-22-0000340 (JPC)

RE: Deft’s Motion to Dismiss (Dkt. 35, filed 9/14/22)

- - - - - - - - - - - - -

1. The above motion was heard on 10/6/22. The court took the motion under advisement, and now issues its ruling. The motion is DENIED. The court’s reasons follow.

2. This is a Rule 12(b)(6) motion for failure to state a claim. Such motions are viewed with disfavor and rarely granted. Marsland v. Pang, 5 Haw. App. 463, 474 (1985).

3. Review of a motion to dismiss is generally limited to the allegations in the complaint, which must be deemed true and viewed in the light most favorable to Plaintiff for purposes of the motion. Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 113 Hawai'i 251, 266 (2007); Bank of Am., N.A. v. Reyes-Toledo, 143 Hawai‘i 249, 257 (2018). However, the court is not required to accept conclusory allegations.

4. On a 12(b)(6) motion, the issue is not solely whether the allegations as currently pled are adequate. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief under any set of facts *or any alternative*

theory. Bank of Am., N.A. v. Reyes-Toledo, 143 Hawai‘i 249, 257 (2018); In re Estate of Rogers, 103 Haw 275, 280-281 (2003); Wright v. Home Depot U.S.A., Inc., 111 Hawai'i 401, 406-07 (2006); Malabe v. AOAO Exec. Ctr., 147 Haw 330, 338 (2020).

5. Hawaii is a notice pleading jurisdiction. The federal "plausibility" pleading standard (Twombly/Iqbal) was expressly considered and rejected by our Hawai‘i Supreme Court in Bank of America v. Reyes-Toledo, 143 Haw 249, 263 (2018). If the complaint is too general or too vague, a defendant may request a more definite statement per Rule 12(e). Id., 143 Haw. at 259-260.

6. This is strictly a 12b6 motion. No alternative request was made under Rule 56.

7. Pltf argues that Reyes-Toledo allows "conclusory" allegations. Reasonable people can disagree on whether an allegation is "conclusory," but the court disagrees that Reyes-Toledo's emphasis on notice pleading somehow permits a complaint to rely solely on conclusory allegations. The court concludes there is no need to decide that issue because the Complaint expressly, specifically, and factually alleges that COVID causes physical loss or damage to property. See:

Paragraph 28: respiratory droplets attach and adhere to and "structurally change" the property;

Paragraph 29: when the virus adheres to the surface of property, it becomes a part of the surface, converting the surface to fomites. This represents a "physical change" in the surface, "which constitutes physical loss and damage."

Paragraph 35: "The presence of the coronavirus and COVID-19, including but not limited to coronavirus droplets or nuclei on solid surfaces and in the air at insured property, has caused direct physical damage to physical property and ambient air at the premises. Coronavirus, a physical substance, attached and adhered to Plaintiffs property, and by doing so, altered that property. Such presence also directly resulted in loss of functionality of that property."

Paragraph 37: “The material dimensions of a property can be altered and damaged through microscopic changes caused by the COVID-19 virus. Such damage may produce deadly results to human beings. If a person infected with the COVID-19 virus enters a building, then, for a certain time the building would be (I) physically altered by the direct physical presence of the virus on surfaces or the air, and (2) thus physically damaged, and (3) may potentially be transformed into a superspreading viral incubator. Plaintiffs covered property went from a satisfactory physical state to an unsatisfactory physical state as the result of the presence of COVID-19 on the property.”

8. Deft argues any potential harm from the virus can be eliminated by cleaning and therefore does not cause any physical loss. This court is barred from making any plausibility determination on causation on a 12b6 motion.

9. Defendant also argues Pltf also must allege that COVID caused physical loss requiring it to “repair,” “replace,” or “re-build” the property (these words are from a provision in the subject insurance policy). The court respectfully disagrees. We are a notice-pleading jurisdiction, and Pltf is generally not required to plead precise words. (See paragraphs 4-5, above.)

10. It is undisputed that the policy at issue is an “all-risk” policy and does not expressly exclude viruses as a cause of loss.

11. The court emphasizes this ruling does not decide any of the insurance coverage issues. This is merely a Rule 12b6 denial based on adequate allegations in the complaint that state a possibly viable claim and give reasonable notice to Deft on what the case is about.

12. The court also does not rule on Pltf’s argument that as a declaratory relief case, dismissal under 12b6 is improper simply because there is a dispute between the parties. This issue is moot based on the above ruling.

13. Pltf will submit a proposed order through the usual Rule 23 process. If counsel cannot agree as to form, to save time the court suggests a short-form order that simply states the result, for reasons stated

on the record at the hearing or in this ruling. If the parties cannot agree as to form, the court will proceed to settle the order per Rule 23.

Dated: 10/10/2022. /s/Jeffrey.P.Crabtree.

/END

RE: First Circuit Court, State of Hawai‘i

RE: Hawaii Theatre Center v. American Insurance Co.,
Civ. No. 1CCV-22-0000340 (JPC)

RE: Deft’s Motion to Dismiss (Dkt. 35, filed 9/14/22)

EXHIBIT F

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DISTRICT COURT

CLARK COUNTY, NEVADA

PANDA RESTAURANT GROUP, INC., PANDA INN INC., PANDA EXPRESS INC., PANDA SYSTEMS INC., HIBACHI-SAN INC., PANDA EXPRESS CT TURNPIKES LLC, PFV II RC LLC, PFV UTC LLC, PFV BARBECUE LLC, YAKIYA OPERATIONS LLC, PANDA EXPRESS (P.R.) INC., GUA-PX LLC, PANDA EXPRESS (CANADA) ULC, ALL STATES REALTY CO., CITADEL PANDA EXPRESS INC., MBOS CONCESSIONS LLC, PLEASANT HILL PX LLC, PACOIMA PX LLC, WEST COLLEGE PX LLC, MID WEST CITY PX LLC, PXCT LLC, ROCKY RIVER PX LLC,

Plaintiffs,

vs.

LEXINGTON INSURANCE COMPANY,

Case No.: A-22-849969-B
Dept. No.: 27

ORDER DENYING DEFENDANTS LEXINGTON INSURANCE COMPANY'S, AIG SPECIALTY INSURANCE COMPANY'S, WESTPORT INSURANCE CORPORATION'S, EVEREST INDEMNITY INSURANCE COMPANY'S, AXIS SURPLUS INSURANCE COMPANY'S, EVANSTON INSURANCE COMPANY'S, MAXUM INDEMNITY COMPANY'S, AND HALLMARK SPECIALTY INSURANCE COMPANY'S MOTION TO DISMISS COMPLAINT

AIG SPECIALTY INSURANCE COMPANY, WESTPORT INSURANCE CORPORATION, EVEREST INDEMNITY INSURANCE COMPANY, AXIS SURPLUS INSURANCE COMPANY, EVANSTON INSURANCE COMPANY, MAXUM INDEMNITY COMPANY, HALLMARK SPECIALTY INSURANCE COMPANY, and DOES 1-20, Defendants.	Complaint Filed: March 19, 2022

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Plaintiffs Panda Restaurant Group, Inc., Panda Inn Inc., Panda Express Inc., Panda Systems Inc., Hibachi-San Inc., Panda Express CT Turnpikes LLC, PFV II RC LLC, PFV UTC LLC, PFV Barbecue LLC, Yakiya Operations LLC, Panda Express (P.R.) Inc., GUA-PX LLC, Panda Express (Canada) ULC, All States Realty Co., Citadel Panda Express Inc., MBOS Concessions LLC, Pleasant Hill PX LLC, Pacoima PX LLC, West College PX LLC, Mid West City PX LLC, PXCT LLC, Rocky River PX LLC (collectively, "Panda" or "Plaintiffs") sued Defendants AIG Specialty Insurance Company's ("AIG"), Axis Surplus Insurance Company's ("Axis"), Evanston Insurance Company's ("Evanston"), Everest Indemnity Insurance Company's ("Everest"), Hallmark Specialty Insurance Company's ("Hallmark"), Lexington Insurance Company's ("Lexington"), Maxum Indemnity Company's ("Maxum"), and Westport Insurance Corporation's ("Westport") (collectively, the "Insurers" or "Defendants") under insurance contracts individually issued by each of the Insurers participating in the 2019-20 and 2020-21 Panda property insurance program (the "Policies"). The Complaint alleges three causes of action for: (1) Anticipatory Breach of Contract; (2) Breach of Contract; and (3) Declaratory Relief.

On July 14, 2022, the Insurers jointly moved to dismiss the Complaint (the "Motion to Dismiss"). On August 15, 2022, Panda filed an opposition to the Motion to Dismiss and, on September 21, 2022, the Insurers replied. On November 3, 2022, the Court held oral argument.

After review and consideration of the points and authorities on file herein and oral argument of counsel, the Court hereby **DENIES** the Insurers' Motion to Dismiss.

STANDARD OF REVIEW

Nevada law requires that a complaint provide "a short and plain statement of the claim showing that [plaintiff] is entitled to relief." N.R.C.P. 8(a). On a motion to dismiss for the failure

to state a claim for relief, this Court construes the pleadings liberally and draws every reasonable factual inference in favor of the allegations. *Vacation Vill., Inc. v. Hitachi Am., Ltd.*, 110 Nev. 481, 484 (1994). Accordingly, dismissal for failure to state a claim is proper "only if it appears beyond a doubt that [the nonmoving party] could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 (2008).

ALLEGATIONS IN PANDA'S COMPLAINT

Panda, owners and operators of restaurant chains around the world, and including here in Nevada, filed this lawsuit seeking coverage under its property insurance policies for losses sustained as the result of SARS-CoV-2 and COVID-19. (*See generally* Compl.)

Each of the Policies issued to Panda by the Insurers generally "insure[] against all risks of direct physical loss or damage to Insured Property" subject to the Policies' terms and conditions. (*Id.*, ¶ 127.) The Policies also include specific provisions and/or extensions for coverage for, *inter alia*, Business Interruption, Communicable Disease, Interruption by Civil or Military Authority, Contingent Time Element, Extended Period of Indemnity, Extra Expense, Ingress & Egress, Ordinary Payroll, Professional Fees, Limit Pollution Coverage, Leasehold Interest, and Spoilage. (*Id.* at ¶ 124, Exs. A through L.)

In seeking insurance coverage from the Insurers, Plaintiff alleges, among other allegations, that SARS-CoV-2 and COVID-19 caused "direct physical loss of or damage to" Panda's insured properties. (*See id.*, ¶ 10 ["SARS-CoV-2 and COVID-19 caused direct physical loss of or damage to properties (or both) throughout the locales where PANDA insured properties are based, including to PANDA locations and surrounding areas, by altering the physical conditions of the properties so that they were no longer safe or fit for occupancy or use, and/or no longer permitted to be used."]; *see also, id.*, ¶¶ 9, 11, 14, 56-61, 63-65, 67, 69, 72-76, 82-88, 92-93, 108, 132-136.)

The Complaint also alleged that from the onset of the COVID-19 catastrophe, Panda associates (employees) working at Panda restaurants and Panda's guests/vendors tested positive for COVID, breathed into the air and touched a multitude of surfaces in the insured properties, making them unsafe and unfit for their intended purposes. (*Id.*, ¶ 133 ["The onsite SARS-CoV-2 virions – including emanating from PANDA's associates and its guests – fomites, and

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respiratory droplets or droplet nuclei containing SARS-CoV-2 virions have attached to and deprived, partially and totally, PANDA of the physical use and functionality of its insured properties by making them unsafe and unusable and thereby lost."]; *see also, id.,* ¶¶ 10, 63, 111-113, 134, 142.)

Furthermore, the Complaint alleges that Panda incurred significant expenses to repair/remediate the insured properties. (*See, e.g., id.*, ¶¶ 108, 132 ["PANDA sustained actual loss, including but not limited, to substantial sums spent to remediate physical damage to its insured properties, such as for the cleanup and removal of SARS-CoV-2 from the premises, improving air filtration systems, remodeling and reconfiguring physical spaces, and other measures to reduce or eliminate the presence of the SARS-CoV-2 virions on its insured properties. Such remediation measures have been ongoing because of the continuous and repeated recurrence of SARS-CoV-2 virions]; *see also, id.*, ¶ 86.) Panda also alleged, that even after reopening its insured locations, several Panda restaurants had to close again due to COVID-19. (*Id.*, ¶¶ 88, 109.) For purposes of a Motion to Dismiss, this Court must take these allegations as true. *Vacation Vill*, 110 Nev. at 484.

RULING

Applying the pleading standards set forth in Nev. R. Civ. P. 8(a), 12(b)(5), and accepting Panda's factual allegation as true, this Court holds that Panda has pled sufficient allegations to withstand the Insurers' Motion to Dismiss. Therefore, based on the foregoing, the Insurers' Motion to Dismiss is **DENIED**. The Insurers shall file their answers within fourteen (14) days of entry of this Order pursuant to Nev. R. Civ. P. 12(a)(3)(A).

Dated this 21st day of November, 2022

Nancy L Allf
MA

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Nancy Allf
District Court Judge

Respectfully Submitted,

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Panda Restaurant Group, Inc., Plaintiff(s) vs. Lexington Insurance Company, Defendant(s)	CASE NO: A-22-849969-B DEPT. NO. Department 27

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Denying Motion was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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